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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 494.

E. L. WHITNEY, WARDEN OF THE IDAHO STATE PENITENTIARY, APPELLANT,

vs.

GEORGE DICK.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED NOVEMBER 22, 1905.

(19996.)

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1 No. 1236.

United States Circuit Court of Appeals for the Ninth Circuit.

In the matter of the application of George Dick for a writ of habeas corpus and a writ of certiorari.

Petition for a writ of habeas corpus and a writ of certiorari.

Filed August 29, 1905.

F. D. MONCKTON, *Clerk.*

2 United States Circuit Court of Appeals for the Ninth Circuit.

IN THE MATTER OF THE APPLICATION OF George Dick for a writ of habeas corpus and a writ of certiorari. } Motion.

To the Hon. United States Circuit Court of Appeals for the Ninth Circuit:

Now comes George W. Tannahill and F. E. Fogg, of counsel for George Dick, petitioner, and move this honorable court for leave to file the petition herewith of the said George Dick for a writ of habeas corpus and a writ of certiorari.

GEO. W. TANNAHILL,
F. E. FOGG,
Of Counsel for Petitioner,
Lewiston, Idaho.

The petitioner respectfully consents and requests that in case writ is issued as requested that the same be made returnable at the term of court to be held either in Portland, Oregon, or Seattle, Washington.

Dated this 15th day of August, A. D. 1905.

GEO. W. TANNAHILL &
F. E. FOGG,
Attorneys for Petitioner.

3 United States Circuit Court of Appeals for the Ninth Circuit.

IN THE MATTER OF THE APPLICATION OF George Dick for a writ of habeas corpus and a writ of certiorari. } Petition.

To the Honorable United States Circuit Court of Appeals for the Ninth Circuit:

Your petitioner, George Dick, a citizen of the United States and of the State of Oregon, respectfully shows: That he is unlawfully and unjustly held in custody, imprisoned, detained, and restrained of his liberty by E. L. Whitney, warden of the Idaho State penitentiary, at the Idaho State penitentiary, in the city of Boise, State of Idaho.

Your petitioner further states that on the 10th day of May, 1905, he was indicted by the grand jury in the United States District Court for the District of Idaho, Northern Division, a true of which indictment is hereto attached, marked Exhibit "A," and made a part of this petition.

That on the 13th day of May, 1905, your petitioner was arraigned in said United States district court upon said indictment, and by written demurrer filed in said court then objected to the jurisdiction of the said court, a true copy of which demurrer is hereto attached, marked Exhibit "B," and made a part of this petition.

4 That said demurrer was overruled and denied by the said District Court, and that thereafter, and on the 15th day of May, 1905, the said District Court, over the objection and protest of your petitioner against the jurisdiction of said court, proceeded with the trial of your petitioner under the said indictment.

That upon the said trial your petitioner objected to the jurisdiction of the said court in open court and to the introduction of any evidence upon the said trial, as follows:

That the indictment did not state facts sufficient to constitute any public offense, nor any offense against any law of the United States, and particularly that the said indictment did not allege any liquor was introduced into the Indian country or upon any Indian allotment from any place without such Indian country or without such Indian allotment; and further, that the facts stated in said indictment do not establish any violation of any law of the United States, and particularly do not establish a violation of section 2139, of the Revised Statute' as amended by 29 Statute at Large, page 506, and that said statute, in as far as it assumes to punish as an offense against the laws of the United States the bringing of liquor within the territory within the limits of this State not within the Indian country and not reserved by the Government for the exclusive use of the Indians, is unconstitutional and void; and for the further reason that this court has no jurisdiction over the subject-matter of the offense charged or attempted to be alleged in the indictment, or over the person of this defendant, for the reason above stated.

That upon the trial of the said cause, it appeared conclusively

5 from the uncontroverted evidence that your petitioner was at the time mentioned in said indictment a Umatilla Indian; that he had an allotment in severalty upon the Umatilla Reservation, and had held a trust patent therefor for three years prior thereto.

That the only act done by your petitioner in reference to the pint of whiskey mentioned in the indictment was at and within the limits of the village of Culdesac; that said village of Culdesac was a duly incorporated municipality, namely, a village incorporated and existing under the laws of the State of Idaho; that no territory used for Government purposes or for Indian purposes was within the said village of Culdesac, and that said village of Culdesac is seven or eight miles outside of the exterior boundaries of the Indian school reservation.

That the only dominion or control that your petitioner exercised over the said whiskey, either directly or indirectly, was to purchase the same at the said village of Culdesac, in a certain building therein situated, and immediately deliver the same at the door of the said building, and within the said village of Culdesac, to one Te-we-Talkt, a Nez Perce Indian, who had therefore taken his land in severalty, and to whom a trust patent from the Government had issued therefor.

It was also admitted by the prosecution on the trial that the title to the lands upon which all of said transactions occurred had passed from

the Government, by patent under the town-site laws of the United States, to the probate judge of Nez Perce County, Idaho, in trust for the inhabitants.

That at the close of the evidence upon the said trial your petitioner, in further protest and objection to the jurisdiction of the said District Court, requested that the court instruct the jury to acquit your
6 petitioner; that said court denied said request, and submitted the case to the jury upon the following instructions:

"Gentlemen: The only instruction I need give you is this: If you find that the defendant had this bottle of whiskey upon him within the limits of what is known as the Nez Perce Indian Reservation, then you are to find him guilty of this charge. The charge, of course, is for introducing liquor into the reservation, but I instruct you that having it in his possession upon the reservation is conclusive. When and where he bought it is immaterial. That it was in his possession within the limits of the Indian reservation is sufficient. I instruct you, as a matter of fact, that Culdesac is within the limits of the reservation."

That thereupon your petitioner, further protesting and objecting to the jurisdiction of the court, excepted to the said instructions in open court, as follows:

"The defendant excepts particularly to that part of the instruction wherein the court instructs the jury that the village of Culdesac is a part of the Indian reservation, and substantially instructs the jury that the village of Culdesac is Indian country or Indian allotment within the meaning of the statute under which the indictment is laid; and further specifically objects to that portion of the instruction given by the court upon its own motion wherein the court instructs the jury that 'if they find from the evidence that there was liquor found in the possession of the defendant that is conclusive presumption that he is guilty of introducing liquor upon the reservation,' denying to the defendant a presumption of innocence of the charge against him."

7 That the jury, on the said 15th day of May, 1905, returned into court a verdict convicting your petitioner of the pretended offense charged in the said indictment, a copy of which said verdict is hereto attached, marked "Exhibit C," and made a part of this petition.

That on the 16th day of May, 1905, your petitioner was arraigned before the bar of the said District Court for sentence, and in further protest and objection to the jurisdiction of said court filed a motion in arrest of judgment of said District Court, a true copy of which said motion is hereto attached, marked "Exhibit D," and made a part of this petition.

That said motion was overruled and denied by said court.

That said court thereupon, upon the said 16th day of May, 1905, rendered its decision and judgment on said verdict of conviction, a true copy of which said judgment is hereto attached, marked "Exhibit E," and made a part of this petition.

That thereafter, and on the 16 day of May, 1905, the said District Court issued out of and under the seal of the said court, and delivered to the United States marshal of the said District Court, a warrant of commitment under said judgment, a true copy of which warrant of commitment is hereto attached, marked "Exhibit F," and made a part of this petition.

That thereafter and on the 18 day of May, 1905, your petitioner was delivered by the said United States marshal under the said commitment to E. L. Whitney, warden, and has ever since been confined in the aforesaid Idaho State Penitentiary by the said E. L. Whitney, warden, under said judgment and commitment.

8 Your petitioner further states and alleges that he is advised that the said United States District Court of the district of Idaho had no jurisdiction or lawful authority to cause the arrest of your petitioner, nor to proceed against him in the manner and form aforesaid, and that the said pretended indictment and trial of your petitioner thereon, the verdict of the jury, the judgment and sentence of the court, and the order and warrant whereby your petitioner was committed to the custody of the said United States marshal, and whereby he is held in custody by the said E. L. Whitney, warden, and restrained of his liberty as aforesaid, were and are, each and all of them, wholly without authority of law, in violation of law, and of the just rights of your petitioner, and void.

That the grand jury returning said indictment had no legal authority to inquire into the offense charged by reason of it not being within the legal jurisdiction of this court, in this, that it appears from said indictment:

That at the time charged in the said indictment there was no Indian country within the said county of Nez Perce, or within the jurisdiction of this court, namely, within the district of Idaho, known or designated as "The Nez Perce Indian Reservation;" that the jurisdiction of the United States over all the country and territory embraced within the former reservation known and designated as "The Nez Perce Indian Reservation" was, by the act of Congress of the United States admitting Idaho as a State into the Union, relinquished to the State of Idaho, excepting only that jurisdiction was retained in the United States over such Indian reservation until the Indians' title to the lands included within the boundary of such reservation should be extinguished; that the Indian or tribal title

9 to the lands therein contained has, since the admission of the said State, been extinguished by allotment of the said land in severalty to the individual Indians and by the purchase of the balance thereof by the United States, and that said allotments and the said purchase have been ratified by the public laws and acts of the Congress of the United States; and further, that the said former reservation known and designated as the Nez Perce Indian Reservation had, prior to the time of the commission of the acts mentioned in said indictment, been opened for occupation, settlement, and disposal under the general land laws of the United States by an act of Congress, and that the same had been, as a matter of general and public knowledge, prior to the time mentioned in said indictment, settled and appropriated by citizens of the State; that various town sites within the boundaries of said former reservation had been settled by citizens and that title thereto transferred from the United States to the inhabitants. Municipal governments, namely villages, had been organized and were in existence within the said boundaries of said former reservation, and that the same, nor any part thereof is not, and was not, at the times mentioned in said indictment, Indian country or lands reserved for the use and occupation of Indians, or occupied by

any Indians maintaining tribal relations or by any Indians or persons whomsoever, over which the United States in exercising or attempting to exercise, any authority or control in nature of guardianship of the person.

That the said district court had not jurisdiction over the person of your petitioner, nor over the offense stated or attempted to be stated in the said indictment, for the reason that it did not appear from the said indictment that the place where the said offense was alleged to have been committed was within the jurisdiction of the State of Idaho; and further, that the law under which your petitioner was indicted, arraigned, convicted, and sentenced, and under which he is now imprisoned, as aforesaid, is unconstitutional and void, for the reason that the Congress of the United States had no power to pass a law providing for police regulations over the matters and things alleged in said indictment within the territory of the State of Idaho, and particularly that Congress was without power to pass such a law providing for such control over any land title of which had passed from the Government, by its patent, under the town-site laws, and within which a municipal corporation had been organized under the laws of the said State, and no part of which territory was used by the said Government for Government purposes or reserved for the use of any Indian or Indian tribe.

That, as is more fully and specifically set forth in the statement of the proceedings hereinbefore contained, and as appears by the exhibits hereto attached, the said district court was without jurisdiction in each and every proceeding therein whereby your petitioner was indicted, tried, sentenced, and committed to the said Idaho State Penitentiary, and that for all the reasons so urged in the said district court, and because of the facts hereinbefore shown, the said proceedings and judgment are wholly void.

For the foregoing reasons and for the further reason that the Hon. James H. Beatty, judge of the United States District Court for the district of Idaho, under whose jurisdiction your petitioner is now confined and restrained of his liberty, has passed upon all the questions presented and raised by this application, holding against the contention of your petitioner, making such application to the said district judge a useless procedure and on account of the delays incident to appeal therefrom, your petitioner has no plain, speedy, or adequate remedy at law, therefore this application is presented direct to the Hon. United States Circuit Court of Appeals.

Wherefore, your petitioner prays that a writ of habeas corpus may be issued out of and under the seal of this honorable court, to be directed to the said E. L. Whitney, warden of the Idaho State Penitentiary, commanding him to have the body of your petitioner, together with a return of the date and cause of his detention, before this honorable court, on a day to be designated therein, and that a writ of certiorari issue, directed to the said United States District Court for the district of Idaho, commanding them to certify and send to this court on a certain day, to be therein designated, a full and complete transcript of the process, records, and proceedings by and before them touching the matter of your petitioner's said arrest, detention, and imprisonment, or that your petitioner may have such other or further full and adequate relief in the premises

as to this court may seem proper*ty*, and that he may be discharged from said custody and imprisonment. And your petitioner will ever pray.

GEORGE (his x mark) DICK,
Petitioner.

Witness to mark:
MILTON G. CAGE,
GEO. W. TANNAHILL.

GEORGE W. TANNAHILL and F. E. FOGG,
of Counsel for Petitioner.

12 STATE OF IDAHO, *County of Ada, ss.*

George Dick, being duly sworn, deposes and says that he is the petitioner above named; that he had read the foregoing petition, by him subscribed, and knows the contents thereof, and that the same is true of his own knowledge.

GEORGE (his x mark) DICK.

Witness to mark:
MILTON G. CAGE,
GEO. W. TANNAHILL.

Subscribed and sworn to before me this 9th day of August, A. D. 1905.

[SEAL.] MILTON G. CAGE,
Notary Public.

Authority relied upon: In re Heff, reported in advance sheet U. S. C. R., May 15, 1905, page 506.

GEO. W. TANNAHILL,
F. E. FOGG,
Attorneys for Petitioner.

13 EXHIBIT "A."

In the District Court of the United States within and for the district of Idaho, May term, 1905. The United States of America vs. George Dick. Indictment. Violation sec. 2139 R. S. as amended 29 Stat., p. 506.

George Dick is accused by the grand jurors of the United States of America within and for the district of Idaho, having been duly summoned, empanelled, and sworn in the name and by the authority of the United States of America, upon their oaths, by this indictment, of the crime of introducing intoxicating liquors into the Indian country, committed as follows, to wit:

That the said George Dick, at the county of Nez Perce, within the district of Idaho and within the jurisdiction of this court, on the 15th day of March, A. D. 1905, then and there being did then and there unlawfully and feloniously introduce intoxicating liquors, to wit, one pint of whiskey (a more particular description of which intoxicating liquor is to the grand jurors unknown), into the Indian country, to wit, into and upon the Nez Perce Indian Reservation in the said county of Nez Perce, against the peace and dignity of the United States and con-

trary to the form, force, and effect of the statute in such cases made and provided.

N. M. RUICK,
United States Attorney, District of Idaho.

O. A. CHRISTENSON,
Foreman of the United States Grand Jury.

Names of witnesses examined before the United States grand jury upon finding the foregoing indictment: Te-we-Talkt, F. G. Mattoon, Watts-la-om-neen, Johnie Yo-Gay-Nil.

(Endorsed:) No. 565. Presented by the foreman in presence of the grand jury, and filed in open court this 10th day of May, 1905. A. L. Richardson, clerk.

A. O. CHRISTENSON,
Foreman Grand Jury.

14 EXHIBIT "B."

In the District Court of the United States within and for the District of Idaho. The United States of America vs. George Dick. Demurrer.

Comes now the said defendant and demurs to the indictment on file herein and for cause and grounds of demurrer allege and shows to the court:

First. That the grand jury returning said indictment had no legal authority to inquire into the offense charged by reason of it not being within the legal jurisdiction of this court, in this, that it appears from said indictment:

A. That at the time charged in the said indictment there was no Indian country within the said county of Nez Perce or within the jurisdiction of this court, namely, within the district of Idaho, known or designated as "The Nez Perce Indian Reservation." That the jurisdiction of the United States over all the country and territory embraced within the former reservation known and designated as "The Nez Perce Indian Reservation" was, by the act of Congress of the United States admitting Idaho as a State into the Union, relinquished to the State of Idaho, excepting only that jurisdiction was retained in the United States over such Indian reservation until the Indians' title to the lands included within the boundary of such reservation should be extinguished; that the Indian or tribal title to the lands therein contained has, since the admission of the said State, been extinguished by allotment of the said land in severalty to the individual Indians and by the purchase of the balance thereof by the United States, and that said allotments and the said purchase have been ratified by the public laws and acts of the Congress of the United States, and, further, that the

15 said former reservation, known and designated as the Nez Perce Indian Reservation had, prior to the time of the commission of the acts mentioned in said indictment, been opened for occupation, settlement, and disposal under the general land laws of the United States by an act of Congress, and that the same had been, as a matter of general and public knowledge, prior to the time mentioned in said indictment, settled and appropriated by citizens of the State; that various town sites within the boundaries of said former reservation had

been settled by citizens and that title thereto transferred from the United States to the inhabitants. Municipal governments, namely, villages, had been organized and were in existence within said boundaries of said former reservation and that the same, nor any part thereof, is not, and was not, at the times mentioned in said indictment, Indian country or lands reserved for the use and occupation of Indians, or occupied by any Indian maintaining tribal relations or by any Indians or persons whomsoever, over which the United States is exercising, or attempting to exercise, any authority or control in nature of guardianship of the person.

Second. That said indictment does not substantially conform to the requirements of sections 7677 and 7679 of the Revised Statutes of Idaho in that the facts and acts constituting the offense charged are not stated so as to enable the defendant to know what is intended, and that the said indictment is uncertain in its statement of particular circumstances of the offense charged for the reason that the words "Nez Perce Indian Reservation" is not the designation of any particular and definite territory such as to enable the defendant to determine whether or not the place attempted to be designated is within or upon lands or territories
16 reserved by the Government of the United States for the use of Indians, or over which the Government has jurisdiction in its administration of Indian affairs, nor can the defendant determine whether or not the place to which it is charged that the defendant introduced the liquor was an Indian allotment, of which the title is held in trust by the Government.

Third. That the facts stated in said indictment do not constitute a public offense and particularly that the facts stated in said indictment are not sufficient to constitute any offense against the laws of the United States, nor any offense within the jurisdiction of this court.

Dated this 11th day of may, A. D. 1905.

F. E. Fogg and
Geo. W. Tannahill,
Attorneys for Defendant, residing at Lewiston, Idaho.

(Endorsed:) Filed May 13, 1905. A. L. Richardson, clerk.

17 "C."

United States District Court, Northern division, district of Idaho.

The United States of America
vs.
George Dick. } Verdict.

We, the jury in the above-entitled cause, find the defendant guilty as charged in the indictment.

C. A. Hagen,
Foreman.

United States of America, *District of Idaho, ss:*

I, A. L. Richardson, clerk of the United States District Court for the district of Idaho, do hereby certify that the foregoing copy of verdict in case No. 565, The United States vs. George Dick, has been by me compared with the original and that it is a correct transcript therefrom, and

of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof I have set my hand and affixed the seal of said court in said district this 9th day of August, 1905.

[SEAL.] A. L. RICHARDSON, *Clerk.*

(Endorsed:) No. 565, U. S. District Court, Northern division, district of Idaho. The United States vs. George Dick. Verdict. Filed May 15, 1905. A. L. Richardson, clerk.

18 EXHIBIT "D."

In the District Court of the United States in and for the district of Idaho. The United States of America vs. George Dick. Motion in arrest of judgment.

Comes now the defendant, George Dick, and moves the court that judgment be arrested and sentence be not passed in this action upon his conviction by the verdict of the jury, under his plea of "Not guilty" herein, for the reasons:

1st. That the indictment herein does not state facts sufficient to constitute a public offense, nor does it state facts sufficient to constitute any offense or any violation of any law of the United States.

2d. That this court has not jurisdiction over the person of this defendant nor over the offense stated or attempted to be stated in the said indictment, for the reason that it does not appear from the said indictment that the place where the said offense charged to have been committed is within the jurisdiction of the United States, but to the contrary it affirmatively appears from said indictment that the place where said offense is alleged to have been committed is within the jurisdiction of the State of Idaho; and further, that the law under which this defendant was indicted and arraigned is unconstitutional and void, for the reason that the Congress of the United States has no power to pass a law providing for police regulation over the matters and things alleged in said indictment, within the territory of the State of Idaho or over the place where said offense is said to have been committed.

Wherefore the defendant prays that judgment upon the said verdict and conviction be arrested and that he be discharged.

19 Dated this 16th day of May, A. D. 1905.

GEO. W. TANNAHILL and
F. E. FOGG,
Attorneys for Defendant.

(Endorsed:) Filed May 16, 1905. A. L. Richardson, clerk.

20 Ex. "E."

In the District Court of the United States for the Northern division of the district of Idaho.

May term, A. D. 1905.

THE UNITED STATES *against* GEORGE DICK. } No. 565. Convicted of introducing intoxicating liquors into the Indian country.

Present: Hon. Jas. H. Beatty, judge.

Now, on this 16th day of May, 1905, the United States district attorney, with the defendant and his counsel, F. E. Fogg, esqr., came into court; the defendant was duly informed by the court of the nature of the indictment found against him for the crime of introducing intoxicating liquor into the Indian country, committed on the 15th day of March, A. D. 1905; of his arraignment and plea of "Not guilty as charged in said indictment;" of his trial and the verdict of the jury on the 15 day of May, A. D. 1905, "Guilty as charged in the indictment." The defendant was then asked by the court if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none; and no sufficient cause being shown or appearing to the court.

Now, therefore, the said defendant having been convicted of the crime of introducing intoxicating liquor into the Indian country.

It is hereby considered and adjudged that the said defendant, George Dick, do pay a fine of one hundred dollars and the costs of this action taxed at one hundred eight and 40/100 dollars, and that he stand committed until said fine is paid.

21 And that he be imprisoned and kept in the penitentiary of the State of Idaho, at Boise, Idaho, for the term of one year and ten days; and it is further ordered and adjudged that said defendant be and is hereby remanded to the custody of the United States marshal for Idaho, to be by him delivered into said prison and to the proper officer or officers thereof.

UNITED STATES OF AMERICA, *District of Idaho, ss:*

I, A. L. Richardson, clerk of the United States District Court for the district of Idaho, do hereby certify that the foregoing copy of judgment in case No. 565, The United States vs. George Dick, has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original as the same appears of record and on file at my office and in my custody.

In testimony whereof I have set my hand and affixed the seal of said court in said district this 9th day of August, 1905.

[SEAL.] A. L. RICHARDSON, *Clerk.*

22 "F."

In the District Court of the United States for the District of Idaho, Northern Division.

THE UNITED STATES } No. 565. For violation of section 2139, R. S.
vs.
GEORGE DICK. }

UNITED STATES OF AMERICA, *District of Idaho, ss:*

The President of the United States to the marshal of the district of Idaho, or to his deputy, and to the keeper of either of the jails in our said district, greeting:

Whereas at the May, 1905, term of the above-entitled court George Dick was duly convicted of the crime of introducing intoxicating liquor into the Indian country contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America, for which offense he hath this day been sentenced by our said court to pay a fine of one hundred /100 dollars, and the costs of this action taxed at one hundred eight & 40/100 dollars, and to be imprisoned in the penitentiary of the State of Idaho, at Boise, Idaho, and to be there kept for the term of one year & ten days, and to stand committed till this sentence be performed.

Now, this is to command you, the said marshal or deputy, to take and keep and safely deliver the said defendant into the custody of the keeper or warden in charge of said prison forthwith.

23 And this is to command you, the said keeper or warden in charge of the said prison, to receive from the said marshal or deputy the said defendant convicted and sentenced as aforesaid, and him keep and imprison in accordance with said sentence, or till he be otherwise discharged by law. Hereof fail not at your peril.

Witness the honorable Jas. H. Beatty, judge of our said court, and the seal thereof affixed at Moscow, in said district, this May 16, 1905.

[SEAL.] A. L. RICHARDSON, *Clerk.*

I hereby certify that I received the within commitment at Moscow, Idaho, on May 16th, 1905, and that I executed the same by delivering George Dick, the defendant named therein, into the custody of the warden of the Idaho State Penitentiary at Boise, Idaho, on May 18th, 1905, as within I am commanded.

[SEAL.] R. ROUNDS, *U. S. Marshal.*

By W. R. BRYON, *Deputy.*

UNITED STATES OF AMERICA, *District of Idaho, ss:*

I, A. L. Richardson, clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing copy of commitment in case No. 565, The United States vs. George Dick, has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

24 In testimony whereof, I have set my hand and affixed the seal of said court in said district this 9th day of August, 1905.

[SEAL.] A. L. RICHARDSON, *Clerk.*

(Endorsed:) Copy. No. 565. In the District Court of the United States for the district of Idaho. The United States vs. George Dick. Commitment. Returned and filed. May 23, 1905. A. L. Richardson, clerk.

(Endorsed:) No. 1236. United States Circuit Court of Appeals for the Ninth circuit. In the matter of the application of George Dick for a writ of habeas corpus and a writ of certiorari. Petition for a writ of habeas corpus and a writ of certiorari. Filed August 29, 1905. F. D. Monckton, clerk.

25 United States Circuit Court of Appeals for the Ninth Circuit.

In re George Dick. Application for a writ of habeas corpus & writ of certiorari.

Return to writ of certiorari.
Filed Sep. 15, 1905.

FRANK D. MONCKTON, *Clerk*,
By MEREDITH SAWYER,
Deputy Clerk.

26 *Indictment.*

In the District Court of the United States within and for the District of Idaho. May term, 1905.

THE UNITED STATES OF AMERICA	Indictment. Violation sec. 2139, R. S., as amended 29 Stat., p. 506. Introducing liquor on Indian reservation.
vs.	
GEORGE DICK.	

George Dick is accused by the grand jurors of the United States of America, within and for the district of Idaho, having been duly summoned, empannelled, and sworn in the name and by the authority of the United States of America, upon their oaths, by this indictment, of the crime of introducing intoxicating liquors into the Indian country, committed as follows, to wit:

That the said George Dick, at the county of Nez Perces, within the district of Idaho, and within the jurisdiction of this court, on the 15th day of March, 1905, then and there being, did then and there unlawfully and feloniously introduce intoxicating liquors, to wit, one pint of whiskey (a more particular description of which intoxicating liquor is to the grand jurors unknown) into the Indian country, to wit, into and upon the Nez Percé Indian Reservation in the said county of Nez Perces, against the peace and dignity of the United States, and contrary to the form, force, and effect of the statute in such cases made and provided.

N. M. RUICK,
United States District Attorney, District of Idaho.

A. O. CHRISTENSON,
Foreman of the Grand Jury.

26½ Names of witnesses examined before the United States grand jury upon finding the foregoing indictment. Te-we-talkt, F. G. Mattson, Wates-la-om-neen, Johnie-Go-hoy-uit.

(Endorsed:) No. 565. In the District Court of the United States within and for the District of Idaho. The United States of America vs. George Dick. Indictment. Violation Sec. 2139, R. S., as amended, 29 Stat., p. 506. Presented by the foreman in the presence of the grand jury and filed in open court this 10th day of May, 1905. A. L. Richardson, clerk. A. O. Christenson, foreman grand jury.

27 *Demurrer.*

In the District Court of the United States within and for the District of Idaho.

THE UNITED STATES OF AMERICA } Demurrer.
vs.
GEORGE DICK. }

Comes now the said defendant and demurs to the indictment on file herein and for cause and grounds of demurrer alleges and shows to the court:

First. That the grand jury returning said indictment had no legal authority to inquire into the offense charged, by reason of it not being within the legal jurisdiction of this court, in this, that it appears from said complaint:

a. That at the time charged in the said indictment there was no Indian country within the said county of Nez Perce or within the jurisdiction of this court, namely, within the district of Idaho, known or designated as "The Nez Perce Indian Reservation." That the jurisdiction of the United States over all the country and territory embraced within the former reservation known and designated as "The Nez Perce Indian Reservation" was, by the act of the Congress of the United States admitting Idaho as a State into the Union, relinquished to the State of Idaho, excepting only that jurisdiction was retained in the United States over such Indian reservation until the Indians' title to the lands included within the boundary of such reservation should be extinguished. That the Indian or tribal title to the lands therein contained has, since the admission of the said State, been extinguished by allotment of
28 the said lands in severalty to the individual Indians and by the purchase of the balance thereof by the United States, and that said allotments and the said purchase have been ratified by the public laws and acts of the Congress of the United States; and further, that the said former reservation known and designated as the Nez Perce Indian Reservation had, prior to the time of the commission of the acts mentioned in said indictment, been opened for occupation, settlement, and disposal under the general land laws of the United States by an act of Congress, and that the same had been, as a matter of general and public knowledge, prior to the time mentioned in said indictment, settled and appropriated by citizens of the State. That various town sites within the boundaries of said former reservation had been settled by citizens and

that title thereto transferred from the United States to the inhabitants. Municipal governments, namely, villages, had been organized and were in existence within the said boundaries of said former reservation and that the same, nor any part thereof, is not, and was not, at the times mentioned in said indictment, Indian country, or lands reserved for the use and occupation of Indians or occupied by any Indian maintaining tribal relations or by any Indians or persons whomsoever over which the United States is exercising, or attempting to exercise, any of the authority or control in nature of the guardianship of the person.

Second. That said indictment does not substantially conform to the requirements of sections 7677 and 7679 of the revised statutes of Idaho in that the facts and acts constituting the offense charged are not stated so as to enable the defendant to know what is intended, and that the said indictment is uncertain, and its statement of particular
29 circumstances of the offense charged for the reason that the words "Nez Perce Indian Reservation" is not the designation of any particular and definite territory such as to enable the defendant to determine whether or not the place attempted to be designated is within or upon lands or territories reserved by the Government of the United States for the use of Indians, or over which the Government has jurisdiction in its administration of Indian affairs, nor can the defendant determine whether or not the place to which it is charged that the defendant introduced the liquor was an Indian allotment, of which the title is held in trust by the Government.

Third. That the facts stated in said indictment do not constitute a public offense and particularly that the facts stated in said indictment are not sufficient to constitute any offense against the laws of the United States, nor any offense within the jurisdiction of this court.

Dated this 11th day of May, A. D. 1905.

FOGG & NUGENT,
Attorneys for Defendant, residing at Lewiston, Idaho.

(Endorsed:) No. 565. In the District Court of the United States within and for the District of Idaho. The United States of America vs. George Dick. Demurrer. Filed May 11th, 1905. A. L. Richardson, clerk.

30 *Defendant's requests.*

In the United States District Court for the District of Idaho.

UNITED STATES OF AMERICA)
vs.)
GEORGE DICK.)

No. 1.

Refused. I instruct you, gentlemen, that notwithstanding you may find from the evidence that the defendant, George Dick, had intoxicating liquor in his possession within the Nez Perce Indian Reservation, or Indian country, still if you further find from the evidence in this case that the defendant did not introduce said liquor into the Nez Perce Indian Reservation, or Indian country, or upon an Indian allotment, then your verdict must be not guilty.

No. 2.

Refused. And I further instruct you that unless you find from the evidence in the case that the defendant brought the said liquor from a point or place from without the limits of the Nez Perce Indian Reservation, or Indian country, into the boundaries of the said Indian reservation, or Indian country, then your verdict must be not guilty.

No. 3.

Refused. I instruct you, gentlemen, to find the defendant, George Dick, not guilty.

(Endorsed:) No. 565. U. S. District Court, District of Idaho. The United States vs. George Dick. Defendant's requests. Filed May 15th, 1905. A. L. Richardson, clerk.

31 *Verdict.*

United States District Court, Northern Division, District of Idaho.

THE UNITED STATES } Verdict.
vs.
GEORGE DICK. }

We, the jury in the above entitled cause, find the defendant guilty as charged in the indictment.

C. A. HAGEN,
Foreman.

(Endorsed:) No. 565. U. S. District Court, Northern Division, District of Idaho. The United States vs. George Dick. Verdict. Filed May 15th, 1905. A. L. Richardson, clerk.

32 *Motion in arrest of judgment.*

In the District Court of the United States, in and for the District of Idaho.

THE UNITED STATES OF AMERICA } Motion in arrest of judgment.
vs.
GEORGE DICK. }

Comes now the defendant, George Dick, and moves the court that judgment be arrested and sentence be not passed in this action upon his conviction, upon verdict of the jury herein, for the reasons:

1st. That the indictment herein does not state facts sufficient to constitute a public offense, nor does it state facts sufficient to constitute any offense or any violation of any laws of the United States.

2nd. That this court has not jurisdiction over the person of this defendant nor over the offense stated or attempted to be stated in the said indictment, for the reason that it does not appear from the said

indictment that the place where the said offense charged to have been committed is within the jurisdiction of the United States; but, to the contrary, it affirmatively appears from said indictment that the place where said offense is alleged to have been committed is within the jurisdiction of the State of Idaho, and further, that the law under which this defendant was indicted and arraigned is unconstitutional and void, for the reason that the Congress of the United States had no power to pass a law providing for police regulations over the matters and things
33 alleged in said indictment within the territory of the State of Idaho or over the place where said offense is said to have been committed.

Wherefore the defendant prays that judgment upon the said plea and conviction of "Guilty" be arrested and that he be discharged.

Dated this 13th day of May, A. D. 1905.

F. E. FOOTE & G. W. TANNAHILL,
Attorneys for Defendant.

(Endorsed:) No. 565. In the District Court of the United States in and for the District of Idaho. The United States of America vs. George Dick. Motion in arrest of judgment. Filed May 16, 1905. A. L. Richardson, clerk.

34 *Order extending time to settle bill of exceptions.*

In the District Court of the United States in and for the District of Idaho, Northern Division.

THE UNITED STATES OF AMERICA *vs.* GEORGE DICK.	Order extending time to settle bill of exceptions.

It appearing to the court that additional time is necessary for the defendant to prepare and present a bill of exceptions taken during the trial for settlement:

It is therefore ordered that the defendant's time for preparing, presenting, and serving upon the district attorney a bill of exceptions thereof upon the trial of the cause, including exceptions taken to the overruling of the demurrer and exceptions to the order of the court overruling and denying defendant's motion and arrest of judgment and all the exceptions taken upon the trial, and the admission and rejection of evidence, and to the instructions of the court, be extended for sixty days from the date of this order.

Done in open court this 16th day of May, A. D. 1905.

JAS. H. BEATTY,
Judge.

(Endorsed:) No. 565. In the District Court of the United States, District of Idaho, Northern Division. The United States of America vs. George Dick. Order extending time to settle bill of exceptions. Filed May 16, 1905. A. L. Richardson, clerk.

35 *Journal entries.*

At a stated term of the District Court of the United States for the District of Idaho, Northern Division, held at Moscow, Idaho, on Wednesday the 10th day of May, 1905:

Present: Hon. Jas. H. Beatty, judge.

THE UNITED STATES
vs.
GEORGE DICK. } No. 565. Introducing liquor.

On this day the defendant herein was brought into court to be arraigned upon the true bill of indictment heretofore presented against him by the grand jury. Being asked if George Dick was his true name, the defendant stated that it was. The formal reading of the indictment was waived and defendant furnished with a true copy thereof by order of court at the expense of the United States. Being asked for his plea, the defendant pleaded that he is not guilty of the offense charged in the indictment.

Saturday, the 13th day of May, 1905.

THE UNITED STATES
vs.
GEORGE DICK. } No. 565. Introducing liquor.

On this day the court announced its decision upon the demurrer to the indictment herein, heretofore argued and submitted. Ordered that said demurrer be and the same is hereby overruled.

36 Monday, the 15th day of May, 1905.

THE UNITED STATES
vs.
GEORGE DICK. } No. 565. Introducing liquor.

Now on this day this cause came on regularly to be heard and tried before the court and jury, N. M. Ruick, U. S. district attorney, appearing as counsel for the plaintiff, and F. E. Fogg and Geo. W. Tannahill, esqrs., on behalf of defendant, said defendant being in court in person. The clerk under direction of the court proceeded to draw from the jury box the names of twelve persons, one at a time, to serve as a jury in said cause, and the following are the names of the persons drawn from the box, sworn on voir dire, passed upon, accepted by the counsel for the respective parties, and sworn by the clerk to well and truly try said cause and a true verdict render therein according to the law and the evidence, to wit: Warren P. Hunt, Jno. E. Randall, H. C. Grice, J. L. Miller, W. H. Simpson, Geo. Brewster, Frank Hart, Geo. P. Thompson, Jesse Reeves, C. A. Hagen, R. S. Mathews, & D. H. Robinson.

The clerk read the indictment to the jury and stated the defendant's plea. Ed. Raboin was sworn as interpreter.

The following named persons were sworn, examined, and cross-examined as witnesses on behalf of plaintiff, to wit: Te-we-talkt, through the interpreter, F. G. Matoon, John Dickson, through the interpreter, John-Yo-hoy-wit, through the interpreter, and Ed. Raboin, and the plantiff rests.

37 George Dick was sworn and examined on his own behalf, and the defense rests and the evidence closed. The said cause was thereupon submitted without argument and said jury, after being instructed by the court, retired to their room to consider of their verdict in charge of an officer of the court duly qualified.

Now came the jury all called and found to be present the respective attorneys of record and the defendant in person being in court. Being asked if they had agreed upon a verdict they, through their foreman, presented their written verdict in the words following, to wit:

"United States District Court, Northern Division, District of Idaho.

"THE UNITED STATES OF AMERICA } Verdict.
vs.
GEORGE DICK. }

"We the jury in the above-entitled cause find the defendant guilty as charged in the indictment.

"C. A. HAGEN, *Foreman.*"

Tuesday, the 16th day of May, 1905.

THE UNITED STATES } No. 565. Introducing liquor.
vs.
GEORGE DICK. }

Now came the defendant in person and by his counsel, F. E. Fogg, esqr., and thereupon the defendant's motion in arrest of judgment
38 herein was submitted to the court, and upon consideration it is ordered that said motion be, and the same is hereby, denied, to which ruling the said defendant by his said counsel then and there excepted in due form of law, and it is ordered that said defendant do pay a fine of $100.00 and costs, and that he be imprisoned in the penitentiary of the State of Idaho, at Boise, Idaho, for the term of one year and ten days.

It is further ordered that execution be stayed herein for a period of sixty days, or during the further order of the court or judge thereof upon the deposit with the clerk of $400.00 cash as security for defendant's appearance when ordered by the court or judge.

In the District Court of the United States for the Northern District of the District of Idaho. May term, A. D. 1905.

THE UNITED STATES } No. 565. Convicted of introducing intoxicating
against liquors into the Indian country.
GEORGE DICK. }

Present: Hon. Jas. H. Beatty, Judge.

Now, on this 16th day of May, 1905, the United States district attorney, with the defendant and his counsel, F. E. Fogg, esqr., came into court; the defendant was duly informed by the court of the nature of the indictment found against him for the crime of introducing intoxicating liquors into the Indian country committed on the 15th day of March, A. D. 1905, of his arraignment and plea of "Not guilty as

charged in said indictment," of his trial and the verdict of the jury on the 15th day of May, A. D. 1905, "Guilty as charged in
39 the indictment." The defendant was then asked by the court if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the court.

Now, therefore, the said defendant having been convicted of the crime of introducing intoxicating liquors into the Indian country

It is hereby considered and adjudged that the said defendant, George Dick, do pay a fine of one hundred (100) dollars, and the costs of this action taxed at one hundred eight and 40/100 dollars, and that he stand committed until said fine is paid.

And that he be imprisoned and kept in the penitentiary of the State of Idaho, at Boise, Idaho, for the term of one year and ten days; and it is further ordered and adjudged that said defendant be, and is hereby, remanded to the custody of the United States marshal for Idaho, to be by him delivered into said prison and to the proper officer or officers thereof.

(Endorsed:) In the District Court of the United States for the District of Idaho. Judgment roll No. 565. The United States vs. George Dick. Filed May 15th, 1905. A. L. Richardson, clerk.

40 *Notice of intention to move for a new trial.*

In the District Court of the United States, in and for the District of Idaho, Northern Division, May term, 1905.

THE UNITED STATES OF AMERICA, plaintiff, vs. GEORGE DICK, DEFENDANT.	Notice of intention to move for a new trial.

To the plaintiff above named, and to N. M. Ruick, district attorney, and by virtue thereof, attorney for plaintiff, and to each of you,

Take notice, that the defendant above named intends to and will move the above-entitled court to vacate and set aside the verdict rendered in the above-entitled cause, on the 15th day of May, A. D. 1905, and to grant a new trial of said cause upon the following grounds, to wit:

1.

Insufficiency of the evidence to justify the verdict and that the same is against law.

2.

Errors of law occurring at the trial and excepted to by the defendant.

3.

Errors of law occurring in the instructions of the court, wherein
41 and whereby the court failed to instruct the jury as to the law, depriving the defendant of having presented to the jury all of the

issues in the case, and thereby preventing the defendant from having a fair and impartial trial.

4.

Errors of law in overruling the defendant's demurrer to the indictment herein, and overruling the defendant's motion in arrest of judgment, and in sentencing the defendant upon the indictment and the verdict returned and filed in said cause.

Said motion will be made and based upon a statement of the case to be hereafter prepared and served, settled and filed, upon the indictment heretofore filed herein, and upon the defendant's motion in arrest of judgment, the minutes of the clerk, and the files and records in the above-entitled cause.

F. E. FOGG,
GEO. W. TANNAHILL,
Attorneys for Defendant, residing at Lewiston, Idaho.

(Endorsed:) No. 565. In the District Court of the United States, Northern Division, District of Idaho. The United States of America, plaintiff, vs. George Dick, defendant. Notice of intention to move for a new trial. Filed May 24th, 1905. A. L. Richardson, clerk. By H. C. Shaver, deputy.

42 *Motion for a new trial.*

In the District Court of the United States, in and for the District of Idaho, Northern Division. May term, 1905.

THE UNITED STATES OF AMERICA, plaintiff, *vs.* GEORGE DICK, DEFENDANT. } Motion for a new trial.

Comes now the defendant above named, pursuant to notice heretofore given, and moves the court that the verdict, rendered in the above-entitled cause on May 15, 1905, be set aside and vacated, and a new trial granted therein upon the following grounds:

1.

Insufficiency of the evidence to justify the verdict, and that the same is against law.

2.

Errors of law occurring at the trial and excepted to by the defendant.

3.

Errors of law occurring in the instructions of the court wherein and whereby the court failed to instruct the jury as to the law, depriving the defendant of having presented to the jury all of the issues in the case, and thereby preventing the defendant from having a fair and impartial trial.

43 4.

Errors of law in overruling the defendant's demurrer to the indict ment herein and in overruling defendant's motion in arrest of judgment and in sentencing the defendant upon the indictment and the verdict returned and filed in said cause.

This motion will be made and based upon a statement of the case to be hereafter prepared and served, the indictment heretofore filed herein, defendant's motion in arrest of judgment, the minutes of the clerk, and the files and records in the above-entitled cause.

F. E. FOGG and
GEO. W. TANNAHILL,
Attorneys for Defendant, residing at Lewiston, Idaho.

(Endorsed:) No. 565. In the District Court of the United States, in and for the District of Idaho, Northern Division. May term, 1905. The United States of America, plaintiff, vs. George Dick, defendant. Motion for a new trial. Filed May 24th, 1905. A. L. Richardson, clerk. By H. C. Shaver, deputy.

44 *Bill of exceptions.*

In the United States District Court for the District of Idaho, Northern Division. May term, 1905.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* GEORGE DICK, DEFENDANT. } Bill of exceptions and statement of case.

Be it remembered that upon the 10th day of May, 1905, the defendant was indicted by the grand jury in the above-entitled court, charged with violation of section 2139, R. S., U. S., amended by 29 Statute, page 506, which indictment is as follows:

"In the District Court of the United States, within and for the District of Idaho. May term, 1905. The United States of America vs. George Dick. Indictment. Violation sec. 2139, R. S., as amended 29 Stat., p. 506.

"George Dick is accused by the grand jurors of the United States of America, within and for the District of Idaho, having been duly summoned, empanelled and sworn in the name and by the authority of the United States of America, upon their oaths, by this indictment, of the crime of introducing intoxicating liquors into the Indian country, committed as follows, to wit:

"That the said George Dick at the county of Nez Perce, within the District of Idaho and within the jurisdiction of this court, on the 15th day of March, A. D. 1905, then and there being, did then and there unlawfully and feloniously introduce intoxicating liquors, to wit, one
45 pint of whiskey (a more particular description of which intoxicating liquor is to the grand jurors unknown), into the Indian country, to wit, into and upon the Nez Perce Indian Reservation in the said county of Nez Perce; against the peace and dignity of the United

States and contrary to the form, force, and effect of the statute in such cases made and provided.

N. M. RUICK,
United States District Attorney, District of Idaho.

A. O. CHRISTENSON,
Foreman of the United States Grand Jury.

Names of witnesses examined before the United States grand jury upon finding the foregoing indictment: Te-we-Talkt, Watts-la-om-neen, Johnie Yo-Gay-Nil, F. G. Matoon.

(Endorsed:) No. 565. Presented by the foreman in presence of the grand jury and filed in open court this 10th day of May, 1905. A. L. Richardson, clerk.

A. O. CHRISTENSON,
Foreman Grand Jury.

Be it further remembered that thereafter, on the 13th day of May, 1905, the defendant filed in said court his demurrer to said indictment, which demurrer is as follows:

"In the District Court of the United States within and for the District of Idaho. The United States of America vs. George Dick.

"Comes now the said defendant and demur*rer*s to the indictment on file herein and for cause and grounds of demurrer alleges and shows to the court:

"First. That the grand jury returning said indictment had no
46 legal authority to inquire into the offense charged by reason of it not being within the legal jurisdiction of this court, in this, that it appears from said complainant:

"A. That at the time charged in the said indictment there was no Indian country within the said county of Nez Perce or within the jurisdiction of this court, namely, within the district of Idaho, known or designated as 'The Nez Perce Indian Reservation;' that the jurisdiction of the United States over all the country and territory embraced within the former reservation known and designated as 'The Nez Perce Indian Reservation' was, by the act of Congress of the United States admitting Idaho as a State into the Union, relinquished to the State of Idaho, excepting only that jurisdiction was retained in the United States over such Indian reservation until the Indians' title to the land included within the boundaries of such reservation should be extinguished; that the Indian or tribal title to the lands therein contained has, since the admission of the said State, been extinguished by allotment of the said land in severalty to the individual Indians and by the purchase of the balance thereof by the United States and that said allotments and the said purchase have been ratified by the public laws and acts of the Congress of the United States, and, further, that the said former reservation known and designated as 'The Nez Perce Indian Reservation' had, prior to the time of the commission of the acts mentioned in said indictment, been open for occupation, settlement, and disposal under the general land laws of the United States by an act of Congress and that the same had been, as a matter of general and public knowledge, prior to the time mentioned in said indictment, settled and appropriated by citizens of the State; that various town sites within the boundaries of said former reservation had been settled by citizens and that title thereto transferred from the United

States to the inhabitants. Municipal governments, namely, vil-
47 lages, had been organized and were in existence within the boundaries of said former reservation, and that the same, nor any part thereof, is not, and was not, at the times mentioned in said indictment, Indian country or lands reserved for the use and occupation of Indians, or occupied by any Indians maintaining tribal relations or by any Indians or persons whomsoever over which the United States is exercising, or attempting to exercise, and of the authority or control, in nature of the guardianship of the person.

"Second. That said indictment does not substantially conform to the requirements of sections 7677 and 7679 of the revised statutes of Idaho in that the facts and acts constituting the offense charged are not stated so as to enable the defendant to know what is intended, and that the said indictment is uncertain in its statements of particular circumstances of the offense charged for the reason that the words 'Nez Perce Indian Reservation' is not the designation of any particular and definite territory such as to enable the defendant to determine whether or not the place attempted to be designated is within or upon lands or territories reserved by the Government of the United States for the use of Indians, or over which the Government has jurisdiction in its administration of Indian affairs, nor can the defendant determine whether or not the place to which it is charged that the defendant introduced the liquor was an Indian allotment, of which the title is held in trust by the Government.

"Third. That the facts stated in said indictment do not constitute a public offense and particularly that the facts stated in said indictment are
not sufficient to constitute any offense against the laws of the
48 United States, or any offense within the jurisdiction of this court.

"Dated this 11th day of May, A. D. 1905.

F. E. FOGG & GEO. W. TANNAHILL,
Attorneys for Defendant, residing at Lewiston, Idaho.

(Endorsed:) Filed May 13, 1905. A. L. Richardson, clerk.

Be it further remembered that thereafter said demurrer was duly argued and submitted to the court for decision and the court then and there, on the 13th day of May, 1905, overruled said demurrer and made and entered its order denying the same, which is as follows:

"In the United States District Court of the District of Idaho, Northern Division, May term, 1905. The United States of America, plaintiff, vs. George Dick, defendant. Order overruling demurrer.

"This cause came on to be heard this 13th day of May, 1905, at 3.00 o'clock p. m., upon the defendant's demurrer to the indictment herein, F. E. Fogg and Geo. W. Tannahill appearing for defendant in support of said demurrer and N. M. Ruick, district attorney, appearing in opposition thereto. After hearing arguments of respective counsel and being fully advised in the premises the court overruled said demurrer.

"Now, therefore, by reason of the law and the premises aforesaid the court orders that said demurrer be and the same hereby is overruled and it is so ordered, to which defendant excepted and exception allowed.

JAS. H. BEATTY,
District Judge."

(Endorsed:) Filed May 13th, 1905. A. L. Richardson, clerk.

49 Be it further remembered that the defendant, George Dick, then and there excepted to the ruling of the court in overruling said demurrer, which exception was at the time allowed.

Be it further remembered that thereafter, and on the 13th day of May, 1905, and after the filing of said demurrer and the order overruling the same, the defendant, reserving his exceptions to said demurrer and to the jurisdiction of the court as urged in said demurrer, pleaded not guilty to the said charge in said indictment.

Be it further remembered that thereafter and on the 15th day of May, 1905, this cause came on regularly for trial upon said indictment and the defendant's plea of not guilty thereto, whereupon a jury was regularly sworn and empanelled to try said cause, N. M. Ruick, esqr., United States District Attorney, appearing for the prosecution, and F. E. Fogg and Geo. W. Tannahill, esqrs., appearing as attorneys for the said defendant.

Be it further remembered that thereupon the following proceedings, and none other, were had, and the following testimony and proof, and none other, was had upon the trial of said cause.

Te-We-Talkt was called and sworn as a witness on behalf of the United States, and upon direct examination by the United States Attorney was asked the following question:

"You are a Nez Perce Indian, living on the Nez Perce Indian Reservation?"

Which question was then and there objected to by the counsel for the defendant, for the reason that the indictment does not state facts
50 sufficient to constitute any public offense nor any offense against any law of the United States, and particularly that the said indictment does not allege that any liquor was introduced into the Indian country, or upon any Indian allotment from any place without such Indian country or without such Indian allotment; and further, that the facts stated in said indictment do not establish any violation of any law of the United States, and particularly do not establish a violation of section 2139 of the Revised Statutes, as amended by 29 Statute at Large, page 506, and that the said statute, inasfar as it assumes to publish as an offense against the laws of the United States the bringing of liquor into any territory within the limits of this State not within the Indian country and not reserved by the Government for the exclusive use of the Indians is unconstitutional and void, and for the further reason that this court has no jurisdiction over the subject-matter of the offense charged or attempted to be alleged in the indictment, nor over the person of this defendant, for the reasons above stated.

Which objection was then and there overruled by the court, and the witness permitted to answer said question, to which ruling and decision of the court the defendant, by his said counsel, then and there excepted, which exception was at the time allowed by the court.

Whereupon the witness, in answer to said question, testified further as follows: "Yes, sir."

And thereupon the said witness, upon direct examination by the United States attorney, further testified as follows:

"I got the bottle of whiskey that Mr. Mattoon, the agent, took away from me on the 13th of March, from George Dick. I bought it at Cul-

desac. Dick, the defendant, gave it to me. The bottle now shown
51 me is the bottle. The agent took this away from me. Dick paid for this whiskey. I and Walter Slominee furnished the money. I furnished four dollars and Walter Slominee furnished fifty cents. Dick got this whiskey at the old man's shop. He stepped in and got it and brought it out. George Dick went in and got this whiskey and brought it out and give it to me.

Be it further remembered that thereupon the said witness upon cross-examination by Mr. Fogg, counsel for the defendant, further testified as follows:

"George Dick got this whiskey at Culdesac, the village of Culdesac, Nez Perce County. He gave me this whiskey, right there within five steps of the place, right in the village of Culdesac. At that time I had an allotment and trust patent. George Dick is a Umatilla Indian. He has an allotment of land in severalty. Al this occurred right there near the door where he bought the whiskey. All these transactions were within the town of Culdesac."

Thereupon the said witness was excused.

Be it further remembered that thereupon F. G. Mattoon was called, sworn, and examined as a witness in behalf of the prosecution, and upon direct examination by the United States Attorney testified as follows:

"I am superintendent and acting agent of the Nez Perce Indians, and was such in the month of March last. As such agent I took this bottle away from Te-We-Talkt. This bottle contains about one quart of whiskey. The village of Culdesac is in Nez Perce County, State of Idaho."

Be it further remembered that thereupon, on cross-examination by Mr. Fogg, counsel for the defendant, the said witness further testified:

52 "Te-We-Talkt, Watch-le-Loome, Johnnie Yo-Gay-Nil are all Indians that have taken their allotments of land in severalty and had trust patents from the Government therefor at the time I speak of. The village of Culdesac is a village organized under the laws of the State of Idaho as a municipal corporation."

Be it further remembered that thereupon the following question was asked the said witness upon cross-examination by Mr. Fogg, of counsel for the said defendant:

"Is any portion of the territory included within the corporate limits of the village of Culdesac under your supervision as Indian Superintendent?"

Which question was objected to by the United States Attorney as incompetent, irrelevant and immaterial, and calling for a question of law. Which objection was then and there sustained by the court, to which ruling and decision of the court the defendant, by his said counsel, then and there excepted, which exception was at the time allowed by the court.

Be it further remembered that thereupon the said witness, upon further cross-examination, testified as follows:

"I do not know whether or not there are any Indians within the corporate limits of the village of Culdesac. There are about sixteen hundred Indians upon the reservation at the present time. Practically all the Indians own lands in severalty."

Be it further remembered that thereupon the said witness was asked the

following question upon cross-examination by Mr. Fogg, of counsel for the defendant:

"As a matter of fact, Mr. Mattoon, do not your duties at the present time as Indian Agent consist of representing the Government in
53 reference to the land and property of the Indians, and some other duties in reference to Indian Schools?"

Which question was objected to by the United States attorney upon the ground that the law defines the duties of the superintendent, and that this is a question for legal decision, which objection was sustained by the court, and the witness not permitted to answer the same. To which ruling and decision of the court the defendant, by his said counsel, then and there excepted, which exception was at the time allowed by the court.

Be it further remembered that thereupon the said witness, upon further cross-examination, testified as follows:

"I do not know of any reservation or any part of the reservation used for Government purposes or for Indian purposes within the boundaries of the village of Culdesac. I have no idea there is any such reservation within such village. Culdesac is seven or eight miles from the exterior boundaries of the Indian school reservation."

Whereupon said witness was excused.

Be it further remembered that thereupon Watch-le-Amnee, a witness duly sworn and examined in behalf of the United States, testified as follows:

"The defendant, George Dick, purchased whiskey at Culdesac about the 13th day of March last, five bottles, and gave the whiskey to Te-We-Talkt and other Indians at Culdesac. The defendant had nothing to do with the whiskey after leaving Culdesac."

Whereupon said witness was excused.

Be it further remembered that Johnnie Yo-Gay-Nil, a witness produced, sworn, and examined on behalf of the United States, testified as follows:

"I saw George Dick give this bottle of whiskey to Te-We-
54 Talkt at Culdesac on the 13th of March. Nothing happened in relation to this whiskey outside of the village of Culdesac."

Whereupon said witness was excused.

Be it further remembered that thereupon Edward Raboin, a witness produced, sworn, and examined in behalf of the United States, testified as follows:

"The defendant, George Dick, at the preliminary examination before Commissioner O'Neill at Lewiston, admitted and testified that he bought liquor at Culdesac at the time charged in the indictment, and that he and three other Indians drank up two bottles of liquor."

Be it further remembered that thereupon the bottle testified to by the witness was offered and received in evidence, together with the contents, as U. S. Exhibit No. 1.

Witness excused.

Be it further remembered that thereupon the defendant, George Dick, was called as a witness in his own behalf, upon direct examination by Mr. Fogg, testified as follows:

"I am a Umatilla Indian. I have an allotment and a trust patent

therefor on the Umatilla Reservation at and before the time that the witness testified that I was at Culdesac. Had my trust patent for about three years."

Thereupon said witness was excused.

Be it further remembered that at the close of the testimony and proof in the said cause, and before the said cause was submitted to the jury, the defendant, by his said attorneys, in writing, as required by the rules of said court, duly presented to said court specific requests for instruction, numbered 1 to 3, inclusive, which said requests for instructions to the jury are as follows:

55 "In the District Court of the United States, within and for the District of Idaho, Northern Division, May term, 1905.

United States of America vs. George Dick. Request for instructions.

"The defendant requests the court to give severally and respectively the following instructions to the jury:

1.

(See instructions in judgment roll.)

That thereupon the court refused to give any or either of said instructions so requested by the defendant, and thereupon instructed and charged the jury as follows:

"Gentlemen: The only instruction I need to give you is this: If you find that the defendant had this bottle of whiskey upon him within the limits of what is known as Nez Perce Indian Reservation, then you are to find him guilty of this charge. The charge, of course, is for introducing liquor into the reservation, but I instruct you that having it in his possession upon the reservation is conclusive. When and where he bought it is immaterial; that it was in his possession within the limits of the Indian reservation is sufficient. I instruct you as a matter of fact, that Culdesac is within the limits of the reservation."

Be it further remembered that immediately after the giving of the said instructions and charge to the jury by the court, and immediately after the denying by the court of the defendant's requests

56 to give either or any of the instructions so presented and requested in writing by the defendant, and in the presence of the jury and before the jury had retired to consider their verdict, the defendant excepted to the refusal of the court to give the instructions so requested, and the instructions given the jury by the court upon its own motion, specifically, as follows:

"The defendant excepts to the refusal of the court to grant the request for instructions numbered 1, 2, and 3, respectively, and specifically excepts to the refusal to grant each of said instructions. The defendant further excepts to the instructions given to the jury upon the court's own motion, particularly to that part of the instructions wherein the court instructs the jury that the village of Culdesac is a part of the Indian reservation, and substantially instructs the jury that the village of Culdesac is Indian country or Indian allotment within the meaning of the statute under which the indictment is laid. And further specifically objects to that portion of the instruction given by the court upon its own motion wherein

the court instructs the jury that 'if they find from the evidence that there was liquor found in the possession of the defendant, that that is conclusive presumption that he is "guilty" of introducing liquor upon the reservation.' Denying to the defendant a presumption of innocence and denying to the defendant the right to prove his innocence of the charge against him."

All of which exceptions were by the court at the time allowed and directed to be made a part of the record.

Be it further remembered that thereupon the jury retired by direction of the court to consider their verdict, and after being absent for a
57 time returned in court on the said 15th day of May, 1905, their verdict being as follows:

"In the District Court of the United States in and for the District of Idaho. The United States of America vs. George Dick. Verdict: We, the jury sworn and empanelled in the above-entitled cause, find the defendant guilty as charged in said indictment.

"C. A. HAGAN, *Foreman.*

"(Endorsed:) Filed May 15, 1905. A. L. Richardson, clerk."

Be it further remembered that thereupon, in open court and before the jury was discharged, the defendant, by his counsel, excepted to the said verdict and moved that the same be set aside, which exception was at the time allowed by the court and made a part of the record herein.

Be it further remembered that thereafter, and on the 16th day of May, 1905, and before judgment was passed by the court upon the said verdict of guilty and conviction of the said offense so charged in said indictment, the said defendant, by his said counsel, made and filed in said court a motion in arrest of judgment, which said motion is as follows:

"In the District Court of the United States in and for the District of Idaho. The United States of America vs. George Dick. Motion in arrest of judgment.

"Comes now the defendant, George Dick, and moves the court that judgment be arrested and sentence be not passed in this action upon his conviction by the verdict of the jury, under his plea of "Not guilty" herein, for the reasons:

"1st. That the indictment herein does not state facts sufficient
58 to constitute a public offense, nor does it state facts sufficient to constitute any offense or any violation of any law of the United States.

"2nd. That this court has no jurisdiction over the person of this defendant, nor over the offense stated or attempted to be stated in the said indictment, for the reason that it does not appear from the said indictment that the place where the said offense charged to have been committed is within the jurisdiction of the United States, but to the contrary it affirmatively appears from said indictment that the place where said offense is alleged to have been committed is within the jurisdiction of the State of Idaho, and further, that the law under which this defendant was indicted and arraigned is unconstitutional and void, for the reason that the Congress of the United States has no power to pass a law providing for police regulation over the matters and things alleged in said indict-

ment within the territory of the State of Idaho, or over the place where said offense is said to have been committed.

"Wherefore the defendant prays that judgment upon the said verdict and conviction be arrested and that he be discharged.

"Dated this 16th day of May, A. D. 1905.

"F. E. FOGG and GEO. W. TANNAHILL,
"*Attorneys for Defendant.*

"(Endorsed:) Filed May 16th, 1905. A. L. Richardson, clerk."

Be it further remembered that on the day last aforesaid the said motion was duly submitted to the court for its decision thereon, and the court, after hearing argument thereon and being fully advised, overruled and denied said motion in arrest of judgment, to which ruling of the court the defendant, by his counsel, then and there duly excepted, which
59 exception was allowed by the court, which ruling and decision of the court the defendant assigns as error.

Be it further remembered that thereafter, and on the 16th day of May, A. D. 1905, the court rendered its judgment and sentence upon said verdict so convicting the said defendant of the said offense set forth in the indictment herein, by which it was ordered and adjudged that the said defendant be imprisoned in the Idaho State penitentiary at Boise, State of Idaho, for the term of one year and ten days, which judgment is filed in this court in this action and of record herein.

Be it further remembered that thereafter, and on the 24th day of May, and within ten days after the verdict herein, the said defendant, by his attorneys, made and filed in this action and served upon the United States district attorney a notice of intention to move for a new trial, which said notice is as follows:

"In the District Court of the United States in and for the District of Idaho, Northern Division, May term, 1905. The United States of America, plaintiff, vs. George Dick, defendant. Notice of intention to move for a new trial.

"To the plaintiff above named and to N. M. Ruick, district attorney, and by virtue thereof, attorney for plaintiff, and to each of you.

"Take notice that the defendant above named intends to and will move the above-entitled court to vacate and set aside the verdict rendered in the above-entitled cause, on the 15th day of May, A. D. 1905, and to grant a new trial of said cause upon the following grounds, to wit:
60 "1. Insufficiency of the evidence to justify the verdict and that the same is against law.

"2. Errors of law occurring at the trial and excepted to by the defendant.

"3. Errors of law occurring in the instructions of the court, wherein and whereby the court failed to instruct the jury as to the law, depriving the defendant of having presented to the jury all of the issues in the case, and thereby preventing the defendant from having a fair and impartial trial.

"4. Errors of law in overruling the defendant's demurrer to the indictment herein, and overruling the defendant's motion in arrest of judgment, and in sentencing the defendant upon the indictment and the verdict returned and filed in said cause.

"Said motion will be made and based upon a statement of the case to be hereafter prepared and served, settled and filed, upon the indictment heretofore filed herein, and upon the defendant's motion in arrest of judgment, the minutes of the clerk, and the files and records in the above-entitled cause.

"F. E. Fogg and Geo. W. Tannahill,
"*Attorneys for Defendant, residing at Lewiston, Idaho.*

"(Endorsed:) Filed May 24th, 1905. A. L. Richardson, clerk."

Be it further remembered that thereafter, and on the said 24th day of May, 1905, the said defendant, by his said attorneys, made and filed in this court and served upon the United States attorney his motion for a new trial, which said motion is as follows:

61 "In the District Court of the United States in and for the District of Idaho, Northern Division, May term, 1905. The United States of America, plaintiff, vs. George Dick, defendant. Motion for a new trial.

"Comes now the defendant above named, pursuant to notice heretofore given, and moves the court that the verdict rendered in the above-entitled cause on May 15th, 1905, be set aside and vacated and a new trial granted therein upon the following grounds:

"1. Insufficiency of the evidence to justify the verdict and that the same is against law.

"2. Errors of law occurring at the trial and excepted to by the defendant.

"3. Errors of law occurring in the instructions of the court wherein and whereby the court failed to instruct the jury as to the law, depriving the defendant of having presented to the jury all of the issues in the case, and thereby preventing the defendant from having a fair and impartial trial.

"4. Errors of law in overruling the defendant's demurrer to the indictment herein, and in overruling the defendant's motion in arrest of judgment, and in sentencing the defendant upon the indictment and the verdict returned and filed in said cause.

"This motion will be made and based upon a statement of the case to be hereafter prepared and served, the indictment heretofore filed herein, defendant's motion in arrest of judgment, the minutes of the clerk, and the files and records in the above-entitled cause.

"F. E. Fogg and
"Geo. W. Tannahill,
"*Attorneys for Defendant, residing at Lewiston, Idaho.*"

(Endorsed:) "Filed May 24th, 1905. A. L. Richardson, clerk."

62 Be it further remembered, that at the same term of this court at which the trial was had and judgment rendered herein, and on the 16th day of May, 1905, the court made the following order:

"In the District Court of the United States in and for the District of Idaho, Northern Division. The United States of America vs. George Dick. Order extending time to settle bill of exceptions.

"It appearing to the court that additional time is necessary for the

defendant to prepare and present a bill of exceptions during the trial for settlement:

"It is therefore ordered that the defendant's time for preparing, presenting, and serving upon the district attorney a bill of exceptions thereof, upon the trial of the cause, including exceptions taken to the overruling of the demurrer and exceptions to the order of the court overruling and denying defendant's motion in arrest of judgment and all the exceptions taken upon the trial, and the admission and rejection of evidence, and to the instructions of the court, be extended for sixty days from the date of this order.

"Done in open court this 16th day of May, A. D. 1905.

"JAS. H. BEATTY, *District Judge.*"

(Endorsed:) "Filed May 16th, 1905. A. L. Richardson, clerk."

63 *Specifications of error.*

Comes now the defendant, George Dick, and assigns and specifies the following grounds of error in the proceedings herein, upon which he will rely for the hearing of the said motion for a new trial, and upon appeal from the judgment herein, or upon appeal from the order, denying his said motion for a new trial, should the same be denied, all of which said errors are based upon exceptions duly taken and allowed, as hereinbefore set forth.

I.

The court erred in overruling defendant's demurrer to the indictment herein severally upon all the grounds stated in the said demurrer.

II.

The court erred in overruling defendant's objection to the following question asked the witness Te-we-Talkt on direct examination: "You are a Nez Perce Indian living on the Nez Perce Indian Reservation?" and in permitting said witness to answer said question, and in admitting any evidence in said indictment, upon all the grounds severally stated in said objection.

III.

The court erred in sustaining the objection of the United States attorney to the following question asked the witness F. G. Mattoon, on cross-examination: "Is any portion of the territory included within the corporal limits of the village of Culdesac under your supervision as Indian superintendent?"

64 IV.

The court erred in sustaining the objection of the United States attorney to the following question asked the witness F. G. Mattoon, on cross-examination: "As a matter of fact, Mr. Mattoon, do not your duties at the present time as Indian agent consist in representing the Government

in reference to the land and property of the Indians, and some other duties in reference to Indian schools?"

V.

The court erred in refusing and failing to give each of the instructions requested by the defendant, numbered 1 to 3, inclusive, respectively.

VI.

The court erred in instructing the jury as a matter of law that the village of Culdesac is a part of the Indian reservation, and in substantially instructing the jury that the village of Culdesac is Indian country, within the meaning of the statute under which the indictment was laid.

VII.

The court erred in instructing the jury as follows: "That I instruct you that having it in his possession upon the reservation is conclusive. When and where he bought it was immaterial. That it was in his possession within the limits of the Indian reservation is sufficient," said instruction denying to the defendant the presumption of innocence, and denying to the defendant the right to prove his innocence of the charge against him.

VIII.

The court erred in rendering judgment upon the said verdict,
65 because the said verdict is contrary to law and the evidence, and the defendant now specified the following particulars in which the evidence is insufficient to support the verdict, judgment, and sentence:

1. There is no evidence whatever that the defendant introduced the liquor mentioned in the indictment, or any liquor into the Indian country, or upon an Indian allotment, or upon any other place prohibited by the statute.

2. There is no evidence that the defendant introduced the said whiskey from any point without to any point within the boundaries of the Nez Perce Reservation.

3. The evidence affirmatively and without conflict shows that the defendant did not introduce the whiskey into the Indian country, but that he bought it within a few feet of the place where he delivered it to the Indian, Te-we-Talkt, and others.

4. The evidence affirmatively and without conflict shows that the defendant exercised no dominion or control, directly or indirectly, over the said whiskey, except within the corporate limits of the village of Culdesac, and that he did not exercise any control over the said whiskey at any place where the Government of the United States had any jurisdiction for the purpose of police control, but to the contrary that the village of Culdesac is a place exclusively within the sovereignty of the State of Idaho for all purposes of police control.

IX.

The court erred in overruling and denying defendant's motion in arrest of judgment, and in passing judgment and sentence upon the defendant upon all grounds severally stated in said motion.

66 Wherefore comes now the defendant, by his counsel, and presents this, his bill of exceptions and statement of case on motion for new trial, and statement of case on appeal to the Circuit Court of Appeals and statement of case on appeal from order denying said motion for a new trial, should the same be denied, and asks that the same be settled and certified by the honorable district judge and filed in this action as such.

F. E. Fogg and
Geo. W. Tannahill,
Attorneys for Defendant.

Due service of the above and foregoing bill of exceptions and statement of case is hereby acknowledged and receipt of copy admitted this 15th day of July, 1905.

And it is further stipulated and agreed that the same may be forthwith and without further notice presented to the hon. district judge for settlement.

N. M. Ruick,
U. S. District Attorney, Boise, Idaho.

The foregoing bill of exceptions and statement of case on motion for a new trial having been prepared, served, and presented for settlement within the time granted by law, the rules of this court and the order of the hon. judge in the above-entitled court, and the same having been examined and no amendments having been proposed thereto, and the hon. United States attorney consenting thereto, the same is hereby settled, and it is hereby certified that the foregoing bill of exceptions and statement of case is true and correct.

Done at Chambers this 21st day of July, 1905.

Jas. H. Beatty,
Judge of the U. S. District Court for the District of Idaho.

67 (Endorsed:) No. 565. In the U. S. District Court for the District of Idaho, Northern Division, May term, 1905. The United States of America, plaintiff, vs. George Dick, defendant. Bill of exceptions and statement of case. Filed July 24th, 1905. A. L. Richardson, clerk. F. E. Fogg and Geo. W. Tannahill, attorneys for defendant, residing at Lewiston, Idaho.

68 *Opinion.*

In the District Court of the United States for the District of Idaho.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
H. F. SCHISSLER ET AL., DEFENDANTS.

N. M. Ruick, U. S. attorney for plaintiff.
Fogg & Tannahill, attorneys for defendants.

BEATTY, *District Judge*:

Under the demurrer to the indictment it is claimed that, notwithstanding the treaty or agreement entered into between the Government and the Nez Perce tribe of Indians on May 1, 1893 (28 Stats., 326), the statutes concerning the introduction of intoxicating liquors into the Indian reservation and the sale thereof to Indians belonging to such reservation, are not applicable to the Nez Perce Indian Reservation; and In re Heff, 197 U. S., 488, is relied upon to support the demurrer. That decision is based upon an act providing for the allotment of lands in severalty to the Indians on the Indian reservations, approved February 8, 1887 (24 Stats., 388). It authorized the President to procure the survey and allotment of the lands in severalty to the Indians for issuing patents therefor to them to be held in trust by the Government for twenty-five years, when final patent shall be issued to the allottees or their heirs, and that upon the completion of
69 the allotments and the patenting of the lands to the allottees, the latter shall be subject to all the laws, civil and criminal, of the State in which they reside; and that any Indian who has taken up "his resident separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens." In construing this act the Supreme Court held that, when under its provisions, an Indian allottee of Indian lands became subject to the laws of the State in which he resided, and a citizen of the United States, he, like all other citizens, ceased to be a ward of the nation, and was subject to its laws just as other citizens were, and not otherwise; and as a consequence, any one selling liquor to him was not subject to the laws concerning the sale of intoxicants to Indians.

The demurrer in this case must be considered in connection with the agreement with the Nez Perce Indians above referred to. This agreement, after referring to the said act of 1887 as authority for negotiating with the Nez Perce Indians for the cession of their surplus lands, recites that in pursuance of the provisions of said act the agreement is made, which, after providing for the cession of the lands, the consideration and payments therefor, and other matters, provides as follows:

"Article IX. It is further agreed that the lands by this agreement ceded, those retained, and those alloted to the said Nez Perce Indians, shall be subject, for a period of twenty-five years, to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, whether under the care

of an Indian agent or not, shall, for a like period, be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians."

70 Such are the only provisions of this agreement possibly bearing upon the question at issue, and there are no provisions placing such Indians under the laws of the State or making them citizens of the United States. If they are subject to such laws or have such rights of citizenship, it must be by virtue of the act of 1887 and other acts. This agreement was "accepted, ratified, and confirmed" by Congress, which gives its provisions the same effect as any other law enacted by that body. While, as stated, this agreement recites that it is made in pursuance of the provisions of the other act, it does not follow that all of them are adopted. That act is referred to as the general authority for negotiating with the Indians for the cession of their lands, in pursuance of which this agreement is made. But it must result that any portions of such act which are in conflict with the agreement and later law must yield to it. It may be conceded that the conclusions of the court in the cited case concerning the citizenship of Indians and their exemption from control of United States police laws and regulations, would apply also to these Nez Perce Indians, if there is no conflict between the acts referred to. While this later agreement or act makes no provision for the citizenship of such Indians, or for their control by such laws, it may still be conceded that the provisions of the other act in such matters would apply to them if their logical results, as construed by said court, would not bring them in conflict with the later law; but this later law, on said agreement, does provide unequivocally that all the lands within this Nez Perce Reservation shall be subject for twenty-five years to all the United States laws regulating the introduction of intoxicants thereon, and that all the Indians allottees of such reservation, whether under the care of an agent or not, shall for a like

71 period be subject to all such laws prohibiting the disposition of intoxicants to Indians. This provision is too plain for doubt, and it can not be made clearer by discussion. It leaves the entire reservation and all the Indian allottees thereof for twenty-five years from May 1, 1893, subject to all the United States laws prohibiting the introduction of intoxicants into the reservation or the disposition thereof to the Indians. If, now, this is inconsistent with those provisions of the former act under which the Supreme Court has held that Indian allottees are entitled to citizenship, and are not subject to the laws concerning intoxicants, it must follow that these provisions of the act of 1887 are not applicable to the Nez Perce Indians, and that they are neither citizens nor subject to the laws of the State, but are still the wards of the nation, at least so far as concerns the laws regulating the sale of intoxicants; but whether that result must follow, or whatever the result, it can not be conceded that this Article IX of the agreement is not to be enforced to its full letter and intent. It was a solemn agreement entered into between the Government and these Indians, who are far above the average Indians in intelligence, and many of whom have had long Christian training and who know the evils of the liquor traffic upon their race. It is well understood that this provision of the treaty or agreement was especially insisted upon by them for the protection of their people.

For them they desired and asked the intervention of the strong arm of that Government which they with unfeigned simplicity rely upon, as the child upon its father. I can not think that this provision of a solemn compact, intended to shelter from debauch and destruction a subjected and dependent people, will be so emasculated by judicial construc-
72 tion as to turn loose upon them a vampire class, totally reckless of the Indians' welfare of law and of society. Such a result can not be made to appear to the untutored savage as consistent with our contract with them, or with honor. I feel no hesitation in holding that this agreement with the Indians must be enforced, and that this conclusion is not in conflict with the ruling cited by the Supreme Court, in which was not involved any similar statute.

The laws applicable to intoxicants in the Nez Perce Reservation are still valid, and will be enforced by the court as they have been, until it is overruled by some controlling court. The demurrer is overruled.

Note: This ruling and opinion shall be considered as made in the other like cases wherein a similar demurrer was overruled.

Dated May 26th, 1905.

(Endorsed:) No. 565. U. S. District Court, Northern Division, District of Idaho. The United States vs. H. F. Schissler et al. Opinion on demurrer. Filed Aug. 1st, 1905. A. L. Richardson, clerk.

73 *Order denying motion for a new trial.*

In the United States District Court for the District of Idaho, Northern Division.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* GEORGE DICK, DEFENDANT. } Order denying motion for new trial.

This cause came on to be heard the 14th day of August, A. D. 1905, pursuant to notice heretofore given, upon the defendant's motion for a new trial herein; Geo. W. Tannahill and F. E. Fogg, esqrs., appearing in support of said motion and N. M. Ruick, United States district attorney for the Northern Division, District of Idaho, appearing in opposition thereto.

After hearing the argument of the respective counsel and having duly considered the same, being fully advised in the premises the court orders that said motion be and the same hereby is overruled and denied.

Now, therefore, by reason of the law and the premises aforesaid it is ordered that said motion for a new trial be, and the same hereby is, overruled and denied, to which the defendant excepted, and exception is hereby settled and allowed.

Done at chambers this 14th day of August, A. D. 1905.

JAS. H. BEATTY,
United States District Judge for the Northern Division, District of Idaho.

74 (Endorsed:) No. 565. In the United States District Court, District of Idaho, Northern Division. United States of America, plaintiff, vs. George Dick, defendant. Order denying motion for a new trial. Filed Aug. 15, 1905. A. L. Richardson, clerk.

75 In the United States Circuit Court of Appeals for the Ninth Circuit.

IN THE MATTER OF THE APPLICATION of George Dick for a writ of habeas corpus and a writ of certiorari. } Certiorari.

The President of the United States to the United States District Court for the District of Idaho, greeting:

Whereas it has been made manifest to our United States Circuit Court of Appeals for the Ninth Circuit by the verified petition of George Dick, the party beneficially interested, that in a certain action pending before you, against the said George Dick in the suit of the United States of America, plaintiff, vs. George Dick, defendant, you, exercising judicial functions, have exceeded your jurisdiction, and being therefore willing to be certified of the said action or proceedings.

We therefore command you that you certify and send to our said United States Circuit Court of Appeals for the Ninth Circuit, at Portland, in the State of Oregon, by or before the eighteen (18th) day of September, A. D. 1905, annexed to the writ a transcript of the record and proceedings in the action aforesaid, with all things touching the same as fully and entirely as it remains before you, by whatsoever names the par-
76 ties may be called therein, that the same may be reviewed by our said United States Circuit Court of Appeals, and that our said United States Circuit Court of Appeals may further cause to be done thereupon what it may appear of right ought to be done.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court of Appeals, at the city of Seattle, Washington, this eleventh day of September, A. D. 1905.

[SEAL.] FRANK D. MONCKTON, *Clerk.*
By MEREDITH SAWYER, *Deputy Clerk.*

(Endorsed:) Certiorari. Filed September 14, 1905. A. L. Richardson, clerk U. S. District Court, District of Idaho.

77 *Clerk's certificate.*

In the District Court of the United States within and for the District of Idaho.

THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* GEORGE DICK, DEFENDANT. }

I, A. L. Richardson, clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 59, inclusive, to be a full, true, and correct copy of the pleadings and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein, and return to the annexed writ of certiorari.

Witness my hand and the seal of said district court affixed at Boise, Idaho, this 14th day of September, 1905.

[SEAL.] A. L. RICHARDSON, *Clerk.*

(Endorsed:) No. 1236. United States Circuit Court of Appeals for the Ninth Circuit. In re George Dick. Application for a writ of habeas corpus & writ of certiorari. Return to writ of certiorari. Filed Sep. 15, 1905. Frank D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

78 *Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.*

79 At a stated term, to wit: The September, 1905, term of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court-room in the city of Seattle, in the State of Washington, on Monday, the eleventh day of September, in the year of our Lord one thousand nine hundred and five.

Present: Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable William W. Morrow, circuit judge.

In the Matter of the Application of George Dick for a writ of habeas corpus and a writ of certiorari. } No. 1236.

Ordered, application for a writ of habeas corpus and for a writ of certiorari presented by Mr. George W. Tannahill, on behalf of the petitioner, and argued and submitted to the court for consideration and decision.

Whereupon, on consideration whereof, ordered, writ of certiorari, issued, directed to the honorable the United States District Court for the district of Idaho, returnable before this court at the city of Portland, in the State of Oregon, by or before the eighteenth instant, and requiring the said District Court to certify to this court a transcript of the record and proceedings in the suit of The United States vs. George Dick.

80 At a stated term, to wit: The September, 1905, term of the United States Circuit Court of Appeals for the Ninth Circuit, held in Chambers in the city of Portland, in the State of Oregon, on Tuesday, the nineteenth day of September, in the year of our Lord one thousand nine hundred and five.

Present: Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable William W. Morrow, circuit judge.

In the Matter of the Application of George Dick for a writ of habeas corpus and a writ of certiorari. } No. 1236.

Ordered, matter presented and argued by Mr. F. E. Fogg, on behalf of the petitioner, no one appearing at the argument on behalf of the respondent, and submitted to the court for consideration and decision.

81 In the United States Circuit Court of Appeals for the Ninth Circuit.

IN THE MATTER OF THE APPLICATION OF George Dick, for a writ of habeas corpus and a writ of certiorari. } No. 1236.

George W. Tannahill and F. E. Fogg, attorneys for petitioner; N. M. Ruick, U. S. attorney.

Before Gilbert, Ross, and Morrow, circuit judges.

MORROW, circuit judge, delivered the opinion of the court:

The petitioner was convicted in the United States District Court for the Northern Division of Idaho at the May Term, 1905, upon an indictment charging him with the crime of introducing intoxicating liquors into the Indian country, to wit, into and upon the Nez Perce Reservation, in the county of Nez Perces, in the State of Idaho, in violation section 2139 of the Revised Statutes of the United States, as amended by the act of January 30, 1897. (29 Stats. 506.) The petition for the writ of habeas corpus and certiorari was presented to this court during its recent session in Seattle, and after consideration a writ of certiorari was directed to issue, returnable at Portland, to bring up a transcript of the record and proceedings in the case.

The petitioner challenges the jurisdiction of the trial court on the ground that the act of the petitioner which is made the basis of
82 the charge, namely, that he introduced intoxicating liquors into the Indian country, was not committed in the Indian country, but in the village of Cul de Sac, a municipal corporation organized under the laws of the State of Idaho. The petitioner is a Umatilla Indian, who has received an allotment of land in severalty.

The act of January 30, 1897, provides as follows: "That any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever, into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter: Provided, however, that the person convicted shall be committed until fine and costs are paid. But it shall be a sufficient defense to any charge of introducing or attempt-
83 ing to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country, that the acts charged were done

under authority, in writing, from the War Department or any officer duly authorized thereunto by the War Department." (29 Stats., 506.)

The act of February 8, 1887, authorized the President to allot lands in severalty to Indians on the various reservations whenever in his opinion any reservation or any part thereof would be advantageous for agriculture and grazing purposes. Section 6 of the act provided as follows: "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, and every Indian in Indian Territory, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property." (24 Stats., 388.)

Pursuant to this act the President authorized negotiations with the Nez Perce Indians in Idaho for the cession to the United
84 States of certain of their lands in that State, and thereupon an agreement was entered into between Commissioners of the United States appointed for that purpose and the principal men and other male adults of the tribe for such cession. This agreement was dated May 1, 1893. It provides in Article I for the cession, relinquishment, and conveyance to the United States by the Nez Perce Indians of all their claim, right, title, and interest in and to all the unallotted lands within the limits of the Nez Perce Reservation, saving and excepting certain described tracts of land which are retained by the Indians. It is provided in Article IX, as follows: "It is further agreed that the lands by this agreement ceded, those retained, and those allotted to the said Nez Perce Indians, shall be subject, for a period of twenty-five years, to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, whether under the care of an Indian agent or not, shall, for a like period, be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians." (28 Stats., 330.)

It is under the terms of this agreement contained in Article IX that the petitioner is charged with having introduced intoxicating liquors into the Indian country.

The village of Cul de Sac is located upon the land ceded by the Indians to the United States, about seven or eight miles from the exterior boundary of the Indian School Reservation, and no reservation or any part of a reservation used for Government purposes or for Indian pur-

poses is within the boundaries of such village. Prior to the transaction involved in this case the title to the lands upon which the village of Cul de Sac is located had passed from the United States by patent under the townsite laws to the probate judge of Nez Perce County, Idaho, in
85 trust for the inhabitants of the village.

There is no question as to the plenary authority of Congress over the tribal relations of the Indians. Such authority has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government. Lone Wolf v. Hitchcock, 187 U. S., 565. But the question involved in the present case does not relate to the tribal affairs of the Nez Perce Indians. The question is, whether Congress can break up the tribal relations of these Indians, allot lands to the individual Indians in severalty, give them the benefit of and make them subject to the laws, both civil and criminal, of the State of Idaho, make them citizens of the United States and declare them entitled to the rights, privileges, and immunities of such citizens, open the lands which they have ceded to the United States to settlement under the land laws of the United States, provide for the conveyance of such lands to individuals and municipal corparations, and still retain over such lands the police power prescribed in Article IX of the agreement of May 1, 1893, with the Nez Perce Indians, providing that for a period of twenty-five years all the laws of the United States prohibiting the introduction of intoxicating liquors into the Indian country shall be applicable to such lands? We do not think that Congress can reserve or exercise such police power within the territorial limits of a State. The police power of the United States can only be exercised where the legislative authority of Congress excludes territorially all State legislation. United States v. DeWitt, 9 Wall., 41, 45; Slaughter-House Cases, 16 Wall., 36, 64.

The late case entitled "The Matter of Heff," 197 U. S., 505, was a petition to the Supreme Court of the United States for a writ of
86 habeas corpus. The petitioner had been convicted of selling liquor to an Indian, a member of the Kickapoo tribe, who had received an allotment of a patent of land under the provisions of the act of February 8, 1887. It was claimed in that case, as in this, that this was in violation of the act of January 31, 1897. The Supreme Court, speaking of the limitation of the police power of the General Government in such a case, said: "In this Republic there is a dual system of government, national and state. Each within its own domain is supreme, and one of the chief functions of this court is to preserve the balance between them, protecting each in the powers it possesses and preventing any trespass thereon by the other. The general police power is reserved to the States, subject, however, to the limitation that in its exercise the State may not trespass upon the rights and powers vested in the General Government. The regulation of the sale of intoxicating liquors is one of the most common and significant exercises of the police power. And so far as it is an exercise of the police power it is within the domain of State jurisdiction." The court says further: "We are of the opinion that when the United States grants the privileges of citizenship to an Indian, gives to him the benefit of and requires him to be subject to the laws, both civil and criminal, of the State, it places him outside the reach of police

regulations on the part of Congress; that the emancipation from Federal control thus created can not be set aside at the instance of the Government without the consent of the individual Indian and the State, and that this emancipation from Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property." This was said with respect to a sale of liquor to an Indian over whom it was said the
87 General Government had parted with its guardianship, and it was held that the court had no jurisdiction of the offense charged. In the present case the sale of liquor was made in a municipal territory clearly within the jurisdiction of the State and outside the jurisdiction of the United States. With respect to such a case the court, in the case of Hoff, supra, said: "It will not be doubted that an act of Congress attempting as a police regulation to punish the sale of liquor by one citizen of a State to another within the territorial limits of that State would be an invasion of the State's jurisdiction and could not be sustained, and it would be immaterial what the antecedent status of either buyer or seller was. There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the State or the nation, and not divided between the two." This statement of the law by the Supreme Court we think disposes of the present case.

It is urged on behalf of the United States that the protection of the Indians afforded by the agreement of May 1, 1893, is necessary to protect them from the deplorable consequences resulting from the liquor traffic; that the State does not assume to regulate such traffic in that territory, and that in default of a law prohibiting the sale of intoxicating liquors to these Indians their degredation and ruin will soon be complete. It is undoubtedly the duty of the white man to protect the Indian from this consuming vice, and there can be no question as to the necessity for prohibitory legislation in this regard. But the courts can not supply such legislation or enforce agreements beyond their jurisdiction. This argument should be addressed to the legislature of the State, which will undoubtedly perform its duty in this respect.

88 It follows that the District Court of Idaho did not have jurisdiction of the offense charged in the indictment, and therefore the petitioner is entitled to his discharge from imprisonment; and it is so ordered.

(Endorsed:) Opinion. Filed Oct. 2, 1905. F. D. Monckton, clerk.

89 United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of the Application of George Dick for a writ of habeas corpus and a writ of certiorari.	No. 1236.

Judgment U. S. Circuit Court of Appeals.

The petition in the above-entitled matter for a writ of habeas corpus and a writ of certiorari having been duly submitted to the court, and the petition for a writ of certiorari therein having been granted and a writ of certiorari having been issued, directed to the honorable the United States District Court for the District of Idaho, and requiring the

said District Court to certify to this court a transcript of the record and proceedings in the suit therein of the United States vs. George Dick, and the return to the said writ of certiorari having been filed, the matter was duly argued and submitted to the court for consideration and decision upon the said return and upon the briefs of counsel for the respective parties.

On consideration whereof, and the court being of the opinion that the United States District Court for the District of Idaho did not have jurisdiction of the offense charged in the indictment found against the petitioner in the suit of the United States vs. George Dick, it is ordered and adjudged that the petitioner, George Dick, be discharged from imprisonment.

(Endorsed:) Judgment. Filed and entered October 2, 1905. F. D. Monckton, clerk.

90 United States Circuit Court of Appeals for the Ninth Circuit.
No. 1236.

IN THE MATTER OF THE APPLICATION OF George Dick for a writ of habeas corpus and a writ of certiorari. } Petition for appeal.

Comes now E. L. Whitney, warden of the Idaho State Penitentiary, appellant, by N. M. Ruick, United States attorney for the District of Idaho, and Edward E. Cushman, special assistant to the attorney-general, and conceiving himself aggrieved by the order and judgment entered herein on the 2nd day of October, 1905, in the above-entitled proceeding, doth hereby appeal from said order and judgment to the Supreme Court of the United States, and he prays that this his appeal may be allowed and that a transcript of the record and proceeding and papers upon which said order and judgment was made duly authenticated may be sent to the Supreme Court of the United States. That this appeal is taken by direction of the Attorney-General of the United States, that he therefor prays that execution of said order and judgment be stayed pending the final determination of the case on appeal.

N. M. RUICK,
United States Attorney for District of Idaho.

EDWARD E. CUSHMAN,
Special Assistant to the Attorney-General and Attorney for Appellant E. L. Whitney, 316 New Post-Office, San Francisco, California.

91 SAN FRANCISCO, CALIFORNIA,
October 31st, 1905.

And now, to wit, on October 31st, 1905, it is ordered that the appeal herein prayed for be allowed as prayed, and that execution be stayed as prayed. Bail fixed at $1,000.

WM. W. MORROW,
Circuit Judge, and one of the Judges of the Court of Appeals of the Ninth Circuit, who heard and decided the above-entitled cause.

(Endorsed:) Petition for, and order allowing appeal, etc. Filed Oct. 31, 1905. F. D. Monckton, clerk.

92 United States Circuit Court of Appeals for the Ninth Circuit.

No. 1236.

IN THE MATTER OF THE APPLICATION OF George Dick for a writ of habeas corpus and a writ of certiorari. } Assignment of errors.

Comes now the respondent herein, E. L. Whitney, warden, and complains and says that in the record and proceedings in the above-entitled cause there is manifest error in this, to wit:

I.

That the court erred in its judgment herein of October 2nd, 1905.

II.

That the court erred in finding and adjudging that the petitioner, George Dick, was unlawfully restrained of his liberty and that he was entitled to be and adjudged to be discharged.

III.

That the court erred in finding and deciding that the District Court of Idaho did not have jurisdiction to punish the offense charged in the place where charged and proven to have been committed.

IV.

That the court erred in finding and deciding that the village of Cul de Sac was not Indian country within the act of January 30th, 1897, and other acts of Congress and treaties.

93 V.

That the court erred in finding and deciding that the foregoing acts and laws were unconstitutional and void in undertaking to provide police regulation on the part of the United States at places entirely within the jurisdiction of the State of Idaho.

VI.

That the court erred in finding and deciding that the place where the offense mentioned in the indictment was charged and shown to have been committed was wholly within the police jurisdiction of the State of Idaho.

VII.

And the court erred in finding and deciding that there was no power in Congress to provide such or any police laws and regulations over lands and places within a State the title of which had passed from the Government by patent under the town-site laws of the United States.

VIII.

That the court erred in finding and deciding that the place where the offense is charged and shown to have been committed was without the police jurisdiction of the United States and within the police jurisdiction of the State of Idaho.

IX.

The court erred in finding and deciding that the United States and Congress had no power by law or treaty to retain police power and jurisdiction for any purpose over lands allotted, patented, or sold under the town-site or other laws.

94 X.

That the court erred in finding and deciding that the said E. L. Whitney, warden, had no authority to detain the said George Dick. And erred in deciding that the said District Court had no jurisdiction or authority to try the said George Dick for said offense, and further erred in discharging the said George Dick upon the return of the writ of habeas corpus herein.

Wherefore the said E. L. Whitney, warden, prays that the order and judgment of the said Circuit Court of Appeals for the Ninth Circuit be reversed, and that if the said George Dick shall have been discharged from custody he be remanded into the custody of your petitioner.

N. M. RUICK,
United States Atty. for the District of Idaho and Atty. for Appellant.

EDWARD E. CUSHMAN,
Special Assistant to the Attorney-General.

(Endorsed:) Assignment of errors. Filed Oct. 31, 1905. F. D. Monckton, clerk.

95 In the United States Circuit Court of Appeals for the Ninth Circuit. September term, 1905.

IN THE MATTER OF THE APPLICATION OF George Dick for a writ of habeas corpus and writ of certiorari. } Application.

Comes now the petitioner, George Dick, and makes application to the above-entitled court for an order requiring and directing E. L. Whitney, warden of the State penitentiary at Boise, Idaho, to forthwith discharge the said petitioner.

The petitioner further represents that on October 2, 1905, the above-entitled court made and rendered its decision upon the writ of habeas corpus and certiorari heretofore issued and ordered the said petitioner discharged, holding that the said United States Court for the District of Idaho had no jurisdiction to try or convict the said George Dick.

The petitioner therefore asks that an order be issued to the said E. L.

Whitney requiring and directing the said E. L. Whitney to forthwith release the petitioner from custody.

GEO. W. TANNAHILL and
F. E. FOOTE,
Attorneys for Petitioner George Dick, residing at Lewiston, Idaho.

(Endorsed:) Application for discharge of petitioner from custody. Filed Nov. 4, 1905. F. D. Monckton, clerk.

96 At a stated term, to wit, the October term, A. D. 1905, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the court room, in the city and county of San Francisco, on Monday the sixth day of November, in the year of our Lord one thousand nine hundred and five.

Present: Honorable William B. Gilbert, circuit judge, Honorable Erskine M. Ross, circuit judge, Honorable Thomas P. Hawley, district judge.

IN THE MATTER OF THE APPLICATION OF George Dick for a writ of habeas corpus and writ of certiorari. } No. 1236.

The application of the petitioner, George Dick, for an order directing the discharge of the petitioner from custody having been presented to the court for consideration and decision, and Mr. Edward E. Cushman, special assistant to the United States Attorney-General, having been heard,

On consideration whereof, and the court being fully advised in the premises, it is ordered that the said application be, and hereby is, denied.

97 At a stated term, to wit, the October term, A. D. 1905, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the court room, in the city and county of San Francisco, on Monday, the thirtieth day of October, in the year of our Lord one thousand nine hundred and five.

Present: Honorable William B. Gilbert, circuit judge, Honorable Erskine M. Ross, circuit judge, Honorable Thomas P. Hawley, district judge.

IN THE MATTER OF THE APPLICATION OF George Dick for a writ of habeas corpus and a writ of certiorari. } No. 1236.

Upon motion of Mr. Edward E. Cushman, special assistant to the United States Attorney-General, it is ordered that the mandate of this court in the above-entitled matter be, and hereby is, stayed for the period of thirty (30) days from date.

98 United States Circuit Court of Appeals for the Ninth Circuit.

IN THE MATTER OF THE APPLICATION OF George Dick for a writ of habeas corpus and a writ of certiorari. } No. 1236.

Certificate of clerk U. S. Circuit Court of Appeals to transcript on appeal.

I, Frank D. Monckton, clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing ninety-seven (97) pages, numbered from one (1) to ninety-seven (97) inclusive, to be a true copy of the record and of the assignment of errors and of all proceedings had in the above-entitled matter in the said the United States Circuit Court of Appeals for the Ninth Circuit, including the opinion filed, as the same remain of record in my office, and that the same together constitute the transcript of record upon appeal to the Supreme Court of the United States in the above-entitled matter.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, this 11th day of November, A. D. 1905.

[SEAL.] F. D. MONCKTON, *Clerk.*

99 United States Circuit Court of Appeals for the Ninth Circuit. No. 1236.

IN THE MATTER OF THE APPLICATION OF George Dick for a writ of habeas corpus and a writ of certiorari. } Citation.

UNITED STATES OF AMERICA, *ss:*

To George Dick, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the 30th day of December, 1905, pursuant to an appeal filed in the clerk's office of the Circuit Court of Appeals for the Ninth Circuit, wherein E. L. Whitney, warden, is appellant, and was respondent below, and George Dick is respondent, and was petitioner below, to show cause, if any there be, why the order and judgment in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 31st day of October, in the year of our Lord one thousand nine hundred and five.

[SEAL.] WM. W. MORROW,
Circuit Judge.

Service of the foregoing citation and the receipt of a copy thereof is hereby admitted this 4th day of November, 1905.

GEO. W. TANNAHILL &
F. E. FOOG,
Attorneys for George Dick, Petitioner.

(Endorsed:) No. 1236. United States Circuit Court of Appeals for the Ninth Circuit. In the matter of the application of George Dick for a writ of habeas corpus and a writ of certiorari. Citation on appeal to Supreme Court U. S. Filed Nov. 9, 1905. F. B. Monckton, clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

(Indorsement on cover:) File No. 19,996. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 494. E. L. Whitney, warden of the Idaho State Penitentiary, appellant, vs. George Dick. Filed November 22d, 1905. File No. 19,996.

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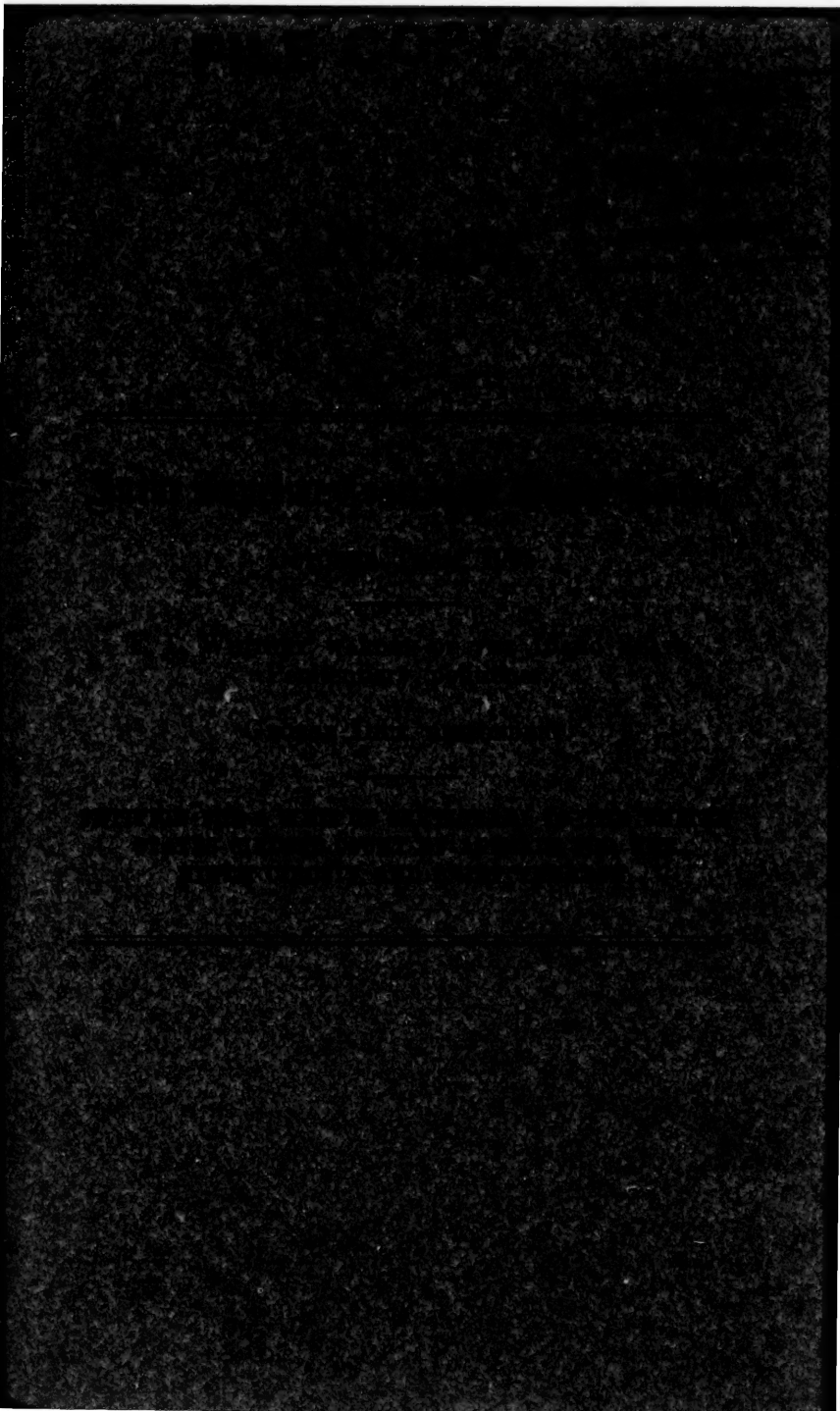

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

E. L. WHITNEY, WARDEN OF THE IDAHO State Penitentiary, petitioner,
vs.
GEORGE DICK, RESPONDENT.

No. ——.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

May 1, 1893, commissioners appointed by the President pursuant to the act of February 8, 1887 (24 Stat. 388), for the allotment of lands in severalty to the Indians, made an Agreement with the Nez Perce tribe in Idaho for the cession to the United States of all the unallotted lands within the limits of their reservation, saving and excepting certain described tracts. This Agreement was ratified by Congress August 15, 1894 (28 Stat. 326, 331).

Article IX of the Agreement provided:

> It is further agreed that the lands by this agreement ceded, those retained, and those allotted to the said Nez Perce Indians shall be subject, for a period of twenty-five years, to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce Indian allottees, whether under the care of an Indian agent or not, shall, for a like period, be subject to all

> the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians.

The validity of this Article, so far at least as it relates to the lands ceded, is drawn in question in this case.

The facts are these:

George Dick, a Umatilla Indian, was indicted at the May term 1905 of the United States District Court for the District of Idaho for introducing liquor into the Indian country, to wit, into and upon the Nez Perce Indian reservation in the county of Nez Perce. (R. 21.)

A demurrer to the indictment was overruled. The grounds of the demurrer were that there was no Indian country in the county of Nez Perce and within the jurisdiction of the court; that the words "Nez Perce Indian reservation" were indefinite and uncertain; and that no offense against the laws of the United States or within the jurisdiction of the District Court was charged. (R. 22.)

At the trial, evidence was introduced to the effect that the alleged offense was committed at the village of Cul de Sac, which is located upon the land ceded by the Nez Perces to the United States. Prior to the alleged offense, this land had passed under the townsite laws to the probate judge of Nez Perce County in trust for the inhabitants of the village.

Dick having been convicted and imprisoned in the State penitentiary in pursuance of the sentence imposed, applied to the Circuit Court of Appeals for the Ninth Circuit for a writ of *habeas corpus* directed to

the warden of the penitentiary, and also for a writ of *certiorari* to the District Court to bring up the record and proceedings in the case. (R. 1–6.)

The Circuit Court of Appeals issued a writ of *certiorari* as prayed, and upon a consideration of the case held the District Court had no jurisdiction of the offense charged, and directed the discharge of the prisoner. (R. 42–43.)

From that judgment an appeal was allowed to this court. (*Whitney* v. *Dick*, No. 494 of this term.) The record in that case, which has been printed, is referred to in this petition.

This application for *certiorari* is made because it is thought an appeal will not lie, there being no pecuniary amount involved. (*Lau Ow Bew* v. *United States*, 144 U. S. 47, 58.)

The question presented is of great importance. Both the Federal and State governments await definite advice as to their jurisdiction over the lands in question and over others similarly situated. The decision of this court in the Heff case (197 U. S. 488) is not controlling. The question there was as to the authority of Congress, *after* an Indian allottee had been made a citizen and put under the jurisdiction of the State, to exercise certain police jurisdiction over him. Here the question is as to the authority of Congress *before* that took place—if it has ever taken place—to reserve a limited jurisdiction over the ceded territory. In this case, the matter of citizenship and subjection to State authority, and not the jurisdiction retained by Congress, is really in issue.

At the time the Agreement in question was made, May 1, 1893, as well as at the time it was ratified by Congress, August 15, 1894, none of the Nez Perces had received allotments in severalty. A schedule of allotments had been completed and submitted to the Land Office on May 15, 1893. This schedule, with certain exceptions, was recommended for approval by the Commissioner of Indian Affairs on March 18, 1895, and on the following day, March 19, 1895, was approved by the Secretary of the Interior, and patents for said allotments directed to issue.

There can be no dispute about these facts, as they are matters of public record. For the convenience of the court, I have attached a certified copy of the records of the Land Office in which they are set forth (Exhibit A). The Reports of the Commissioner of Indian Affairs also show that no allotments to the Nez Perces were approved or patents issued prior to 1895. (Rep. Com. Indian Affairs, 1893, p. 23; Id. 1894, p. 20; Id. 1895, p. 19.) It is true the Agreement purports to cede the "unallotted" lands in the reservation. But the parties had in mind allotments to be made or in process of making, not any which had been made.

As, under the act of February 8, 1887, sec. 6, citizenship and subjection to the jurisdiction of the State does not attach until "the completion of said allotments and the patenting of the lands to said allottee," it follows that at the time the Agreement was made and ratified the Nez Perces were still wards of the nation and the power of Congress to regulate commerce with

them had been in no wise impaired. If the stipulations in the Agreement are inconsistent with the citizenship and subjection to State jurisdiction provided by the Act of 1887, it would seem that the provisions of the act must yield to those of the Agreement, since the Agreement is the later and more specific expression of the legislative will on the subject.

A further ground for bringing up this case is that the Circuit Court of Appeals apparently was without jurisdiction to issue the writ of *habeas corpus*. The authority of the Federal courts to issue writs of *habeas corpus* is purely statutory, and no such authority has been conferred upon the Circuit Courts of Appeals. They are authorized to review final decisions in the Circuit and District Courts only by writ of error or appeal, and to issue only such writs as may be necessary for the exercise of the appellate jurisdiction conferred upon them. In the latter grant, as shown in the brief hereon, the writ of *habeas corpus* is not included.

In any event it would seem that the writ was improvidently issued. Judgment was imposed May 18, 1905, and stay of execution for sixty days ordered upon defendant's giving $400 cash security for his appearance (R. 18), in default of which he was committed. (R. 11). The petition for the writ of *habeas corpus* and *certiorari* was filed August 29, 1905. (R. 1). At the time of the application, therefore, petitioner's right of appeal, either to this court or to the

Circuit Court of Appeals, had not expired. Instead of taking an appeal—although it appears that a bill of exceptions was prepared for that purpose (R. 21–33)—he sued out a writ of *habeas corpus*.

For the reasons stated, it is prayed that a writ of *certiorari*, either in pursuance of section 6 of the act of March 3, 1891 (26 Stat., 826), or section 716 of the Revised Statutes, may issue to the Circuit Court of Appeals to bring up the case for such action as the circumstances may require. Process is prayed under both statutes because, as this case involves the constitutionality of a law of the United States, it does not belong to the class of cases "made final" in the Circuit Court of Appeals by the act of March 3, 1891, and therefore it is doubtful whether *certiorari* could issue under that act. (But see *Lau Ow Bew* v. *United States*, 144 U. S., 58.) This court has declared its authority, under section 716, R. S., to issue a writ of *certiorari* "in all proper cases" (*In re Tampa Suburban Railroad Company*, 168 U. S., 587), and, if the circumstances imperatively require it, "to correct excesses of jurisdiction and in furtherance of justice." (*In re Chetwood*, 165 U. S., 443, 462.) See also *In re Vidal*, 179 U. S., 126.

The jurisdictional question is not suggested for the purpose of delay, but because it is necessarily presented by the circumstances of the case, and I feel that I should be derelict in my duty to the court if I did not advert to it. But as both the

United States and the State are concerned in the speedy decision of the question of governmental control presented on the merits, I beg to suggest, with the concurrence of counsel for respondent, that if the court should be of the opinion that the Circuit Court of Appeals was without jurisdiction to issue the writ of *habeas corpus*, and must, perforce, upon *certiorari*, dispose of the case on that ground, the court will, if it issue the writ, advance the case and take it as submitted upon the briefs filed with this application, in order that the respondent may, when the case is disposed of, bring the proceedings in the District Court here by writ of error or otherwise for review without unnecessary delay. Those proceedings having been vacated by the judgment of the Circuit Court of Appeals, a writ of error will not lie, it is believed, until the judgment of that court is set aside.

HENRY M. HOYT,
Solicitor General.

EXHIBIT A.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, December 30, 1905.

I, C. F. Larrabee, Acting Commissioner of Indian Affairs, do hereby certify that the paper hereto attached is a true and literal copy of the certificates attached to the original schedule of allotments made to the Nez Perce Indians in the State of Idaho as the same appear of record in this Office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this Office to be affixed, [SEAL] on the day and year first above written.

C. F. LARRABEE,
Acting Commissioner.

We hereby certify that the foregoing schedule of Allotments (123 sheets) made by us to the Indians residing on the Nez Perce Reservation Idaho is correct; that each of the persons therein named is entitled to the lands allotted to him or her. And that the same were selected in accordance with the provisions of the Act of Congress Approved February 8, 1887, and amended and approved February 28, 1891, and the instructions of the Acting Commissioner of Indian Affairs approved by the Secretary of the Interior.

ALICE C. FLETCHER,
U. S. Special Agent.
WARREN I. ROBBINS,
U. S. Indian Agent.

MAY 15 1893.

DEPARTMENT OF THE INTERIOR.
OFFICE OF INDIAN AFFAIRS,
March 18, 1895.

The foregoing schedule (embracing 123 sheets) of allotments of lands in severalty made to the Indians on the Lapwai or Nez Perce Reservation in Idaho under the Act of Congress Approved February 8, 1887, (24 Stats.,) 388, as amended by the Act of February 28, 1891, (26 Stats., 794) by Special Agent Alice C. Fletcher and U. S. Indian Agent W. D. Robbins, under authority of the President dated April 13, 1889, And instructions from the Office approved by the Department, is respectfully submitted to the Secretary of the Interior, with the recommendation that he approve the Allotments therein described (Except those numbered 194, 291, 387, 416, 459, 573, 574, 575, 678, 684, 685, 686, 695, 696, 697, 703, 742, 743, 744, 745, 746, 764, 765, 796, 806, 814, 815, 816, 821, 877, 878, 879, 880, 881, 882, 901, 916, 917, 918, 919, 924, 931, 932, 933, 946, 948, 949, 968, 969, 970, 997, 999, 1000, 1001, 1002, 1003, 1019, 1023, 1024, 1025, 1026, 1027, 1032, 1033, 1034, 1050, 1051, 1056, 1057, 1058, 1059, 1075, 1147, 1157, 1158, 1192, 1199, 1200, 1208, 1209, 1217, 1272, 1326, 1427, 1478, 1479, 1628, and 1629 which are suspended) and cause patents to issue therefor in the names of the Allottees as provided in the 5th Section of said Act of February 8, 1887.

D. M. BROWNING,
Commissioner.

DEPARTMENT OF THE INTERIOR,
March 19th, 1895.

The Allotments to the Nez Perce Indians in Idaho, as described in the above recommendation of the Commissioner of Indian Affairs, are hereby approved (Except those numbered 194, 291, 387, 416, 459, 573, 574, 575, 678, 684, 685, 686, 695, 696, 697, 703, 742, 743, 744, 745, 746, 764, 765, 796, 806, 814, 815, 816, 821, 877, 878, 879, 880, 881, 882, 901, 916, 917, 918, 919, 924, 931, 932, 933, 946, 948, 949, 968, 969, 970, 997, 999, 1000, 1001, 1002, 1003, 1019, 1023, 1024, 1025, 1026, 1027, 1032, 1033, 1034, 1050, 1051, 1056, 1057, 1058, 1059, 1075, 1147, 1157, 1158, 1192, 1199, 1200, 1208, 1209, 1217, 1272, 1326, 1427, 1478, 1479, 1628, and 1629 which are suspended) And the Commissioner of the General Land Office is directed to cause patents to issue therefor (except the numbers suspended) in form and of the legal effect prescribed by the 5th section of the Act of February 8, 1887.

HOKE SMITH, *Secretary.*

15247—06——2

BRIEF IN SUPPORT OF PETITION.

I.

As to the Authority of the Circuit Court of Appeals to issue the Writ of Habeas Corpus.

The Constitution provides (Art. I, sec. 9):

> The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

The constitutional provision is not, however, a grant of power to the courts to issue the writ, but a limitation upon its suspension by Congress or the Executive. The jurisdiction of the Federal courts to issue writs of *habeas corpus* (except so far as the original jurisdiction of this court is concerned) is purely statutory.

> *Ex parte Bollmann*, 4 Cranch, 93–94.
> *Ex parte Dorr*, 3 How. 104–105.
> *Ex parte Parks*, 93 U. S. 22.
> *Ex parte Hung Hang*, 108 U. S. 552.
> *In re Burrus*, 136 U. S. 586, 589 et seq.
> *Ex parte Caldwell*, 138 Fed. Rep. 487.
> 2 *Story on Const.*, sec. 1341.
> *Cooley's Const. Lim.*, *345–*349.

The several statutes on the subject have been embodied in Chapter Thirteen of the Revised Statutes, which provides:

> Sec. 751. The Supreme Court and the Circuit and District Courts shall have power to issue writs of *habeas corpus*.

Sec. 752. The several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty.

In these sections there is, of course, no mention of the Circuit Courts of Appeals.

The Circuit Court of Appeals Act (26 Stat. 826) provides:

Sec. 2. That there is hereby created in each circuit a Circuit Court of Appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record with *appellate jurisdiction, as is hereafter limited and established.* Such court shall prescribe the form and style of its seal and the form of writs and other process and procedure *as may be conformable to the exercise of its jurisdiction as shall be conferred by law.* * * *

* * * * *

Sec. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error or otherwise, from said district courts shall only be subject to review in the Supreme Court of the United States or in the Circuit Court of Appeals hereby established, as is hereinafter provided, *and the review, by appeal, by writ of error, or otherwise,* from the existing circuit courts shall be had only in the Supreme Court of the United States or in the Circuit

Courts of Appeals hereby established *according to the provisions of this act regulating the same.*

* * * * *

Sec. 6. That the Circuit Courts of Appeals established by this act shall exercise *appellate jurisdiction* to review *by appeal or by writ of error* final decision in the district court and the existing circuit courts in all cases, etc.

* * * * *

Sec. 12. That the Circuit Court of Appeals shall have the powers specified in section seven hundred and sixteen of the Revised Statutes of the United States.

Section 716 R. S. provides:

Sec. 716. The Supreme Court and the Circuit and District Courts shall have power to issue writs of *scire facias.* They shall also have power to issue all writs not specifically provided for by statute, *which may be necessary for the exercise of their respective jurisdictions,* and agreeable to the usages and principles of law.

That section 716 R. S. does not confer power to issue writs of *habeas corpus* is clear when its origin is considered. It was taken from section 14 of the Judiciary Act of 1789, which provided (1 Stat. 81):

That all the before mentioned courts of the United States shall have power to issue writs of *scire facias, habeas corpus,* and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the Supreme Court, as well

> as the judges of the district courts shall have power to grant writs of *habeas corpus* for the purpose of inquiring into the cause of commitment. *Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless when they are in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

The provisions of this statute, so far as they relate to writs of *habeas corpus*, were incorporated into sections 751, 752 and 753 of the Revised Statutes, while those relating to *scire facias* and the other writs referred to were incorporated into section 716. Section 716 cannot therefore be construed to authorize the issuance of a writ of *habeas corpus*.

The action of Congress in making section 716 alone applicable to the Circuit Courts of Appeals would seem to settle the matter, as there is nothing in the language of the Circuit Court of Appeals act which, in the face of that action, would warrant the implication of the right to issue writs of *habeas corpus*. The language of the act is most restrictive. Aside from section 716 R. S. (made applicable by sec. 12), their authority to review final decisions of the District and Circuit Courts is limited to writ of error and appeal.

The fact that no appeal would lie to this court from the action of Circuit Courts of Appeals in issuing a writ of *habeas corpus*, even in a case involving a constitutional question, further supports the view that they were not intended to exercise such jurisdiction.

In Foster's Federal Practice, vol. 2, p. 736, sec. 366, it is said that the jurisdiction of Circuit Courts of Appeals to issue the writ of *habeas corpus* is unsettled. In *In re Boles*, 48 Fed. Rep. 75, the Circuit Court of Appeals for the Eighth Circuit (Caldwell, Hallett and Thayer sitting) held that it had no jurisdiction to issue the writ for service outside its circuit, although its jurisdiction was invoked to review the decision of a territorial court within the circuit. In that case the contention was made that the court was without authority to issue the writ even where the petitioner was unlawfully restrained of his liberty within the circuit, but the court thought it best not to express any opinion on this important question. In *In re Nevitt*, 117 Fed. Rep. 448, the same court, but composed of different judges (Sanborn and Lochren), apparently assumed—the point was not raised—that it had authority to issue the writ in a proper case, though it refused to do so in that one.

In what has been said it has been assumed that this case is within the appellate jurisdiction of the Circuit Court of Appeals. If it is not, there is no ground whatever for issuing the writ, since it possesses no original jurisdiction. Whether it is within its appellate jurisdiction is not clear.

There are but two substantial questions in the case: 1. Whether the defendant did in fact introduce liquor into the place specified in the indictment. 2. Whether that place was Indian country. The first is an issue of fact, which was found by the jury and consequently

is not reviewable by any court. The second is a question of law dependent upon the validity of the Agreement with the Indians—a constitutional question properly reviewable under the Court of Appeals act by this court. If the incidental questions involved—the sufficiency of the venue laid in the indictment and the correctness of the court's rulings and instructions at the trial—warrant an appeal to the Circuit Court of Appeals, the decision of that court would apparently be final, as no pecuniary matter is involved, despite the fact that the substantial question presented is a constitutional one.

In any event, it would seem that the writ of *habeas corpus* was improvidently issued, as the time in which a writ of error might have been sued out, either to this court or to the Circuit Court of Appeals, had not expired. (*Riggins* v. *United States*, decided December 11, 1905.) In that case the court quoted the following with approval from the Chapman case, 156 U. S. 211:

> We are impressed with the conviction that the orderly administration of justice will be better subserved by our declining to exercise appellate jurisdiction in the mode desired until the conclusion of the proceedings. *If judgment goes against petitioner and is affirmed by the Court of Appeals and a writ of error lies, that is the proper and better remedy for any cause of complaint he may have.* If, on the other hand, a writ of error does not lie to this court, and the Supreme Court of the District was absolutely without jurisdiction, the petitioner may *then* seek his remedy

through application for a writ of *habeas corpus*. We discover no exceptional circumstances which demand our interposition in advance of adjudication by the *courts* of the District upon the merits of the case before them.

II. On the Merits.

It was competent for Congress to stipulate that the lands ceded by the Nez Perces should be subject for a definite period to the laws of the United States regulating the introduction of liquor into the Indian country.

At the time the agreement of May 1, 1893, was made and ratified, the Nez Perce Indian Reservation, being lands to which the Indian title had not been extinguished, was clearly Indian country within the meaning of the laws of the United States. By Article IX of the agreement it is declared that it shall continue to be Indian country for a period of twenty-five years. The authority of Congress so to provide is settled by the decisions of this court.

In *Bates* v. *Clark*, 95 U. S. 204, the court, referring to the lands described as Indian country in the act of June 30, 1834, said (p. 208):

> The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer. As soon as they parted with the title, it ceased to be Indian country, without any further act of Congress, *unless by the treaty by which the Indians parted with their title, or by some act of Congress, a different rule was made applicable to the case.*

The court then proceeded to illustrate its meaning, as follows (pp. 208–209):

> In the case of *The American Fur Company* v. *The United States*, 2 Pet. 358, decided in 1829, the goods of the company had been seized for violating the laws by their introduction into the Indian country under the act of 1802. This court held that if, by treaties made with the Indians after the passage of that act, their title to the region where the offence was committed had been extinguished, it had thereby ceased to be Indian country, and the statute did not apply to it.
>
> So in the case of *United States* v. *Forty-three Gallons of Whiskey*, decided at the last term, 93 U. S. 188, where this act of 1834 was fully considered; while the court holds that by a certain clause in the treaty by which the *locus in quo* was ceded by the Indians, it remained Indian country until they removed from it, the whole opinion goes upon the hypothesis that when the Indian title is extinguished it ceases to be Indian country, unless some such reservation takes it out of the rule. When this treaty was made, in 1864, the land ceded was within the territorial limits of the State of Minnesota. *The opinion holds that it was Indian country before the treaty, and did not cease to be so when the treaty was made*, by reason of the special clause to the contrary in the treaty, *though within the boundaries of a State.*
>
> It follows from this that all the country described by the act of 1834 as Indian country remains Indian country so long as the Indians

> retain their original title to the soil, and ceases to be Indian country whenever they lose that title, *in the absence of any different provision by treaty or by act of Congress.*

In *Ex parte Crow Dog*, 109 U. S. 556, after quoting the rule announced in *Bates* v. *Clark*, the court said (pp. 561–562):

> In our opinion that definition now applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of it has been acquired since the passage of the act of 1834, and notwithstanding the formal definition in that act has been dropped from the statutes, excluding, however, any territory embraced within the exterior geographical limits of a State, not excepted from its jurisdiction by treaty or by statute, at the time of its admission into the Union, *but saving, even in respect to territory not thus excepted and actually in the exclusive occupancy of Indians, the authority of Congress over it, under the constitutional power to regulate commerce with the Indian tribes, and under any treaty made in pursuance of it. United States* v. *McBratney*, 104 U. S. 621.

The cases cited establish two propositions, which seem controlling in the present case:

1. The potency of a treaty or an act of Congress to continue as Indian country lands to which the Indian title has been extinguished.

2. The immateriality of the fact that such lands are within an organized county of a State, as was the case

in *United States* v. *Forty-three Gallons of Whiskey*, 93 U. S. 188.

In the last mentioned case the court said (pp. 197–198):

> The chiefs doubtless saw, from the curtailment of their reservation, and the consequent restriction of the limits of the "Indian country," that the ceded lands would be used to store liquors for sale to the young men of the tribe; and they well knew, that, if there was no cession, they were already sufficiently protected by the extent of their reservation.
>
> Under such circumstances, it was natural that they should be unwilling to sell, until assured that the commercial regulation respecting the introduction of spirituous liquors should remain in force in the ceded country, until otherwise directed by Congress or the President. This stipulation was not only reasonable in itself, but was justly due from a strong government to a weak people it had engaged to protect. It is not easy to see how it infringes upon the position of equality which Minnesota holds with the other States. The principle that Federal jurisdiction must be everywhere the same, under the same circumstances, has not been departed from. The prohibition rests on grounds which so far from making a distinction between the States, apply to them all alike. The fact that the ceded territory is within the limits of Minnesota is a mere incident; for the act of Congress imported into the treaty applies alike to all Indian tribes occupying a particular country, whether within or without State

lines. Based as it is exclusively on the Federal authority over the *subject-matter*, there is no disturbance of the principle of State equality.

Besides, the power to make treaties with the Indian tribes is, as we have seen, coextensive with that to make treaties with foreign nations. In regard to the latter, it is, beyond doubt, ample to cover all the usual subjects of diplomacy. One of them relates to the disability of the citizens or subjects of either contracting nation to take, by descent or devise, real property situate in the territory of the other. If a treaty to which the United States is a party removed such disability, and secured to them the right so to take and hold such property, as if they were natives of this country, it might contravene the statutes of a State; but, in that event, the courts would disregard them, and give to the alien the full protection conferred by its provisions. If this result can thus be obtained, surely the Federal government may, in the exercise of its acknowledged power to treat with Indians, make the provision in question, coming, as it fairly does, within the clause relating to the regulation of commerce.

Minnesota, instead of being injured, is benefited. An immense tract of valuable country formerly withheld from her civil jurisdiction is subjected to it, and her wealth and power greatly increased. Traversed by railroads that were built, in part, at least, with lands which this treaty enabled Congress to grant, the country is open to sale and pre-emption and home-

> stead settlement, and will soon be occupied by a hardy and industrious people. The general government asks in return for this, that the ceded territory shall retain its original *status*, so far as the introduction within it of spirituous liquors and the sale of them to the Pembina Indians are concerned.
>
> It would seem, apart from the question of power, that the price paid by the State bears no proportion to the substantial and enduring benefits conferred upon her; and we are happy to say, that her officers are not engaged in making this defence.

But, it is said, the Nez Perces, having since received their allotments, are by virtue of the act of February 8, 1887, as interpreted by the court in the Heff case (197 U. S. 488), citizens of the United States and subject to the laws of the State of Idaho. Assuming, for the purposes of the argument, that this is so, how does that fact affect the jurisdiction expressly retained by Congress to regulate the introduction of intoxicants upon the ceded lands for a specified period? The stipulation in the Agreement to that effect was within the competency of Congress, under the decision in the case last cited, notwithstanding the lands were embraced within the limits and general jurisdiction of the State, and why should a subsequent change in the political status of one or all of the Indians impair the validity of the stipulation or relieve the United States from its obligation or power to enforce it? It is true that, under the decision in the Heff case, Congress has no jurisdiction to regulate commerce with the Indian tribes after

they have become citizens and been made subject to the laws of the State. But this Agreement, or regulation, was made before that occurred and while the Indians were still subject to the exclusive jurisdiction of Congress.

It is also to be borne in mind, as pointed out in *United States* v. *Forty-three Gallons of Whiskey*, supra, that the power of Congress to make treaties with the Indian tribes is co-extensive with its power to make treaties with foreign nations. As an illustration of the latter power the court referred to the subordination to treaty stipulations with a foreign nation of State laws regulating the right of aliens to take by descent or devise real property situate therein. The United States of course has no general jurisdiction to regulate the subject of inheritance in the States, but in pursuance of its authority to make treaties with foreign nations it could stipulate to do that which in effect amounted to such regulation, and make aliens competent to take by devise or descent. Applying that principle to the case in hand, the court held the jurisdiction of the State over the territory ceded was limited by the treaty stipulations with the Indians. The State was deemed to have accepted the grant upon the condition named, which condition was held not to be incompatible with the equal rights of the State with the other States of the Union.

Any change in the status of the Nez Perces is therefore unimportant. The General Government acquired the lands in question upon the express agreement that

they should be subject for a period of twenty-five years to the laws of the United States prohibiting the introduction of intoxicants in the Indian country. This agreement was made in pursuance of the constitutional authority of Congress to regulate commerce with the Indian tribes. It is the supreme law of the land, and must be recognized as such by both Federal and State courts.

The authority of Congress to retain jurisdiction and control over the lands of the Indians after they have become citizens and subject to the laws of the State is further illustrated by the case of *United States* v. *Rickert*, 188 U. S. 432, where it was held that the allotments made to them under the act of February 8, 1887, were not subject to State or municipal taxation. It is true it was said in that case that the allottees were still wards of the Government. But in the Heff case, where it was held otherwise, the Rickert case, in so far as it held that the lands of the allottees were not subject to taxation by the State, is cited with approval. (197 U. S., 508–509.)

There is here no divided jurisdiction, as the national laws entirely supersede State legislation on the subject.

In the act of July 3, 1890 (26 Stat., 215), admitting Idaho as a State, nothing was said as to the Indian lands or reservations. But the constitution formed by the people of Idaho at the time of the admission of the State provided (Article XXI, sec. 19)—

> And the people of the State of Idaho do agree and declare that we forever disclaim all right and title to the unappropriated public

> lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indians or Indian tribes; and, until the title thereto shall have been extinguished by the United States, the same shall be subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

This was simply a recognition by the State of the absolute jurisdiction of Congress over the lands of the Indians until the Indian title was extinguished—not an agreement on the part of Congress that upon the extinguishment of the Indian title such absolute jurisdiction should revert to the State. It was for Congress to determine how the Indian title should be extinguished and the State can not complain if in order to do so it was necessary or desirable to stipulate for the retention of a limited jurisdiction over said lands for a specified period, since it is the ultimate beneficiary of such action.

If the Agreement of May 1, 1893 is in conflict with the Act of February 8, 1887, the Agreement should prevail.

The Agreement states that it is made in pursuance of the provisions of the act of February 8, 1887, and so far as possible, therefore, the provisions of that act should be given effect. But in case of conflict the general provisions of the act of 1887 must give way to the special provisions of the Agreement, which, having been ratified by Congress and approved by the President, has all the force and effect of a later statute.

This would unquestionably be so in the case of a conflict between different methods of allotment prescribed by the two statutes. Why should not the same rule be applied to the present situation?

Section 6 of the act of 1887 provides that Indians receiving allotments under the provisions thereof shall be citizens of the United States and entitled to the benefit of and subject to the laws, both civil and criminal, of the State or Territory in which they may reside. Article IX of the Agreement provides that the lands ceded by the Nez Perces, those retained and those allotted shall be subject for a period of twenty-five years to all the laws of the United States prohibiting the introduction of intoxicants into the Indian country, and that the Nez Perce allottees, whether under the care of an Indian agent or not, shall, for a like period, be subject to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians.

There can be no question as to the authority of Congress to have provided, in terms, that the Nez Perces should not, by virtue of their allotments, become citizens of the United States and subject to the laws of the State. Hence, if it has provided for a retention of jurisdiction by the United States inconsistent with the citizenship of the Indian and his subjection to State jurisdiction, it has done impliedly and indirectly no more than it could have done expressly and directly. The special provisions in the Agree-

ment on this particular subject must, it would seem, override the general provisions in the act of 1887.

In *Ex parte Viles*, 139 Fed. Rep., 68, the District Court, W. D. Washington, held, as stated in the headnote:

> The provision of article 9 of the agreement made May 1, 1893, with the Nez Perce tribe of Indians, confirmed by act August 15, 1894, 28 Stat., 330, c. 290, that allottees of such tribe, whether under the care of an Indian agent or not, shall be subject for a period of 25 years "to all the laws of the United States prohibiting the sale or other disposition of intoxicants to Indians," can apply only to Indians who received their allotments and acquired their rights of citizenship pursuant to such agreement, and can not affect the status of one who had previously acquired such rights and had become subject to State laws, so as to give force and validity as to him, to the unconstitutional act of January 30, 1897, 29 Stat., 506, c. 109, making it a crime to sell liquor to Indian allottees.

It will be seen that in this case the District Court was laboring under the erroneous impression that the Agreement of May 1, 1893, was made and ratified after the Nez Perces had received their original allotments. The court said that it did not appear from the record when the Indian to whom liquor had been sold in that case had received his allotment, and therefore indulged the presumption that he had received it prior to the Agreement. But, as set forth in the petition herein, the original allotments to the

Nez Perces were all made after the Agreement and were intended to be subject thereto. The provisions of Article IX refer to all the allotments, all the allottees, and all the lands.

In the report of the Commissioner of Indian Affairs for 1895, it is stated (p. 24):

> The checks for the first payment to the Nez Perces (except in cases where payment is suspended for letters of guardianship, etc.) have been transmitted to the agency for delivery to the Indians entitled thereto; also 1,575 patents to be delivered to allottees. This is in accordance with the agreement ratified by the act of August 15, 1894 (28 Stats., 286). It is expected that all preliminary requirements of the agreement will be complied with so as to permit the opening of the ceded lands by October 1, if the Department so desires.

I am advised that not only the representatives of the Government but the principal men of the Nez Perces desired the insertion of Article IX and the assurances for their protection which it contained. That theirs was no idle fear appears from the Reports of the Commissioner of Indian Affairs. Before the allotment and cession the Indian agents reported not more than one or two cases annually of the introduction of liquor in the reservation, while since that time, although the laws of the United States were supposed to be in force, it has been difficult to control the matter, and the recent decree of the Circuit Court of Appeals holding that the Federal jurisdiction is at

an end has inaugurated a general movement of the liquor people into the Nez Perce country.

Nothing was said in the Agreement upon the subject of citizenship and State jurisdiction. The Nez Perces were not apparently concerned with those questions. The Reports of the Commissioner of Indian Affairs show that they have little inclination to exercise the rights of citizenship with which the Supreme Court of the State has held them to be endowed. (*Wa-la-note-tke-tynin* v. *Carter*, 1898, 6 Idaho, 85, in which case, however, the Agreement of 1893 was not referred to.) But they were concerned—vitally concerned—with the liquor question. Can it be that the United States is unable to carry out its compact on this subject, and that the general provisions of the act of 1887, of which the Nez Perces were doubtless ignorant, nullify the express stipulations made to them in the Agreement?

It is to be remembered that we have not here, as in the matter of Heff, a case where Congress had parted with its jurisdiction over the Indians and then afterwards attempted to reassert it, but a case where Congress was in possession of absolute jurisdiction over the Indians and their lands and could do with them as it saw fit. If there be a conflict between the provisions of the act of February 8, 1887, and Article IX of the Agreement of 1893, the question then is simply one of intention. Applying well-settled principles, the later and more specific provision should prevail.

The stipulations in the Agreement are separable—that as to the lands may stand, though that as to the allottees should fall.

If the court should be of the opinion that Congress intended the Nez Perces should, upon receiving their allotments, be citizens of the United States and subject to the laws of the State, and that the stipulation in Article IX of the Agreement that they shall be subject for twenty-five years to all the laws of the United States prohibiting the sale of intoxicants to Indians has become void because of their change of status, nevertheless the stipulation in that Article as to the lands of the Nez Perces may stand, because it is entirely separable and independent, and, under the decision in *United States* v. *Forty-three Gallons of Whiskey*, *supra*, as heretofore pointed out, is within the constitutional power of Congress.

It is respectfully submitted that a writ of *certiorari* should issue as prayed.

HENRY M. HOYT,
Solicitor General.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

No. 494

E. L. WHITNEY, Warden of the Idaho State Penitentiary,
Appellant.

vs.

GEORGE DICK,
Respondent.

No. 557

E. L. WHITNEY, Warden of the Idaho State Penitentiary,
Petitioner.

vs.

GEORGE DICK,
Respondent.

BRIEF OF RESPONDENT

FRANK E. FOGG,
Attorney for Respondent.

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BRIEF OF RESPONDENT

An order of this court having been made that the record in No. 494, this term, shall stand as the return to the Writ of Certiorari, issued in No. 557, and that both cases are advanced to be submitted on printed briefs, the respondent, believing that the issues in both cases are so nearly identical as to render their separate treatment unnecessary, asks the Court to consider this brief in each of the above named cases.

The questions involved in the case made upon the return to the Writ of Certiorari, as well as upon the appeal, were discussed in the brief heretofore filed by the respondent in opposition to the petition for the Writ of Certiorari, and I shall avoid as far as practicable, duplication of the points covered in that brief, and will submit the present brief as supplementary thereto.

Herein, I will first discuss the leading question involved: Has the United States jurisdiction for the purpose of local police control over territory within a state owned in fee by white citizens of such state, and not reserved for use and occupancy by Indians, nor for any government purpose whatsoever.

I shall assume, as I am confident the record fully warrants, that this question was squarely presented by proceedings clearly within the jurisdiction of the Circuit Court of Appeals, and is now properly before this Court for review.

Following this I shall briefly and specifically direct the attention of the Court to such matters, shown by the record and transcript herein, as may be necessary to fortify my position as above stated.

The Honorable Circuit Court of Appeals, in the decision in the case at bar, (Transcript, page 42) said:

> In the present case the sale of liquor was made in a municipal territory clearly within the jurisdiction of the State and outside the jurisdiction of the United States. With respect to such a case the Court in the case of Heff, supra said: "It will not be doubted that an act of Congress attempting as a police regulation to punish the sale of liquor by one citizen of a State to another within the territorial limits of that State would be an invasion of the State's jurisdiction and could not be sustained, and it would be immaterial what the antecendent status of either buyer of seller was. There is in these police matters no such thing as a divided sov-

ereignty. Jurisdiction is vested entirely in either the State or the nation, and not divided between the two." This statement of the law by the Supreme Court we think disposes of the present case.

I believe that the broad constitutional question decided in re Heff, 197 U. S. 505—that there can be in police matters *no such thing as a divided sovereignty*, is absolutely controlling in the case at bar, and that the respondent's case might well be submitted upon the simple statement of the foregoing proposition.

But in the present case there are even stronger reasons than were presented in the matter of Heff, supra, for denying to the United States jurisdiction in the premises.

In the matter of Heff, this Court based its decision upon the unconstitutionality of the act of January 30, 1897, 28 State. L. 506, in as far as that act attempted to control the sale of liquors to an Indian, to whom an allotment of land has been made, and who, by the act of receiving such allotment, had become, under the laws of the United States, a citizen of the United States, and of the state wherein he resides. While in the case at bar, I contend that even if the statute could be held constitutional the acts charged do not constitute an offense under the statute.

The indictment, conviction and commitment of the respondent, Dick, are founded upon the charge of introducing liquor in the village of Culdesac, an incorporated village within the State of Idaho. There is no dispute about the fact, indeed, there could be none, as the District Court of Idaho, as well as the Circuit Court of Appeals, and this Court we apprehend, takes judicial knowledge of the location of an incorporated town, and that under the laws of the United States, lands reserved for the use and occupation of Indians, or for any government purpose, could not be included within a patent of the United States to the inhabitants of a town under the townsite laws.

The Circuit Court of Appeals says: (Page 40-41 Transcript.)

> The Village of Culdesac is located upon land ceded to the Indian by the United States, about six or seven miles from the exterior boundary of the Indian School Reservation, and no reservation or any part of a reservation used for government purposes, or for Indian purposes is within the boundaries of such village. Prior to the transaction involved in this case the title to the lands upon which the village of Culdesac is located had passed from the United States by patent under the townsite laws to the Probate Judge of Nez Perce county, Idaho, in trust for the inhabitants of the village.

The respondent was indicted under the provisions of 29 Stat. L. 506, for introducing liquor into and upon the Nez Perce Indian reservation. (Transcript, page 12.) It will be noted that the charge is for introducing, not for the selling of liquor, and that the general allegation that the place to which the liquor was introduced was Indian country is controlled by the specific statement that it was upon the Nez Perce Indian reservation; but the Indian title to the Nez Perce reservation had long since been extinguished, and the territory formerly embraced therein consisted either of lands patented in fee to the settlers under the homestead and townsite laws, or of Indian allotments, or of public lands of the United States. These are facts of which the Court necessarily takes judicial knowledge, and unless the entire former Nez Perce reservation is to be deemed Indian country, within the terms of the statute upon which the prosecution was predicated, then the indictment charges no public offense.

The statute provides, among other things, as follows:

> Any person who shall introduce, or attempt to introduce any malt, spirits, or vinous liquors, * of any kind whatsoever, into the Indian country, which term shall include any Indian allotment, while the title to the same shall be held in trust by the government, or while

the same shall remain inalienable by the allottee, without the consent of the United States, shall be punished, etc.

29 Stat. L. 506.

This statute is subsequent to the act of congress ratifying the agreement with the Nez Perces, by which it was attempted to retain jurisdiction over the lands ceded by the Nez Perce Indians for the purpose of regulating the sale of intoxicating liquors, and amends the then existing laws, in so far as inconsistent in its provision. The fact that Congress provided that the term "Indian Country" should include any Indian allotment while the title to the same should be held in trust by the government would indicate that that term as used in that act, was not deemed sufficiently broad to include land with which the government had parted with title, even though it be held in trust for the Indian, and, *a fortiori* must the term "Indian country," have been used in a sense excluding entirely lands that the government had patented to white citizens without any restriction whatsoever. Therefore, it seems to me that by the very terms of the act under which the respondent was charged, even if the same could be held constitutional, that the lands included within the Village of Culdesac, the title to which had passed from the United States without restriction, are excluded from the term "Indian Country", as contained in said act.

There can be no doubt that the effect of the act of January 30th, 1897, 28 Stat. L. 506, is to amend the laws existing at the time of the agreement of May 1, 1893, with the Nez Perces, in relation to the prohibition of the introduction of intoxicating liquors into the Indian country, by providing a definition of the term Indian country, which by specifically including any Indian allotment while the title to the same shall be held in trust by the government, thereby excluded the idea that the term "Indian Country" includes lands of which the title had passed by government patent to citizens of the state without restriction. This act is of general ap-

plication, and the Nez Perce Indian reservation is in no manner excepted from its provisions. It cannot be successfully maintained that congress, by the act of ratifying the agreement with the Nez Perces, could place any restrictions upon future legislation, amending or even abrogating the existing law in reference to the prohibition of the introduction of liquor.

The plenary power of Congress over tribal relations and lands cannot be limited by provisions of treaty so as to preclude future enactments, giving effect to the government policy in relation thereto.

Lone Wolf v. Hitchcock, 187 U. S. 553.

A brief consideration of the principles upon which this Court decided, in the matter of Heff, that the act of 1897, 29 Stat. L. 506, was invalid, is as far as it attempted to regulate the sale of liquor to an Indian who had become a citizen, I think will lead to the conclusion that it is equally invalid in as far as it is attempted to apply it to prohibit the introduction of liquor for the purpose of commerce with citizens at any place where the government has parted with its title to the citizens of the state without any restriction.

This Court, in a line of decisions reaching from a period of nearly a century, has based the power of the Federal government to legislate in reference to the sale of liquor to Indians solely upon the provision of section 8, article 1, of the Constitution, granting to Congress power "to regulate commerce with foreign nations, and among the several states, and with Indian tribes."

For the purpose of giving effect to this provision of the Constitution, Indian tribes were considered as standing in a similar position to foreign nations, and members of Indian tribes were treated in analogy to citizens of a foreign country.

As long as the tribal relations were maintained, this Court has repeatedly held that Congress, under this provision of the Constitution, had power not only to prohibit the sale of liquor within the Indian country, but to members of the tribes outside of the Indian country, and in United States v. Forty

three Gallons Whisky, 93 U. S., 198, held that congress had power to exclude spiritous liquors not only from Indian countries, but from that which has ceased to be so by reason of its cession to the United States, but being within territory in proximity to that where the Indian lived. This case is cited by the Honorable Solicitor General in his brief accompanying his petition for certiorari, and is relied upon as sustaining his position that the United States has jurisdiction in the case at bar. It will be noted, however, that that the authority of Congress in that case is predicated entirely upon the clause in the constitution relating to the regulating of commerce with Indian *tribes*. The Court in that case, referring to United States vs. Holliday, 3 Wall, 409, which is followed, says:

> But this Court held that the power to regulate commerce *with Indian tribes* was in its nature general and not confined to any locality, that its existence carried with it the right to exercise it *whenever there was a subject to act upon*, although within the limits of the state, and that it extended to the regulation of commerce with the individual members of such *tribes*. * * * * *

The Court then proceeds to apply these principles to the case under consideration, as follows:

> As long as the Indian remains a *distinct people with the existing tribal organizations*, recognized by the Political Department of the Government, Congress has power to say with whom and on what terms they shall deal, and what articles shall be contraband.

The Court in this case also cited Worcester v. Georgia, 6 Pet. 515, and commenting upon that case says:

> Chief Justice Marshall, in this case with force of reasoning and extent of learning rarely equalled, stated and explained the condition of the Indians in their relation to the United States and to the states within whose boundaries they lived, and this exposition was *based on the power to make treaties and regulate commerce*

> *with the Indian tribes,* * * * * * and Congress has now the exclusive and unfettered power to regulate commerce with the *Indian tribes*, a power as broad as to regulate commerce with foreign nations.

In a decision sustaining the constitutionality of the act of 1862 amending the act of June 30th, 1834, 4 Stat. U. S. 732, prohibiting the sale of spiritous liquors to an Indian under the charge of an Indian agent, this Court said:

> The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any *Indian tribe* or any person who is *a member of such tribe* is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on. It is not, however, intended by these remarks to imply that this clause of the Constitution authorizes Congress to regulate any other commerce, originated and ended within the limits of a single state, than commerce with the *Indian tribes*.
>
> United States v. Holliday, 3 Wall. 407-420.

The only essential point decided in Bates v. Clarke, 95 U. S. 204, also cited by the Solicitor General, is that all the country described by the act of 1834 as Indian country, remains Indian country so long as the Indians retain their title and right to the soil, and ceases to be Indian country whenever they lose their title, in absence of any different provision by treaty or by act of Congress. And in this case the Court holds that the territory upon which the liquor was seized had ceased to be Indian country as soon as the Indians parted with title, without any further act of Congress.

And in this case the Courtt distinguished its decision in United States v. Forty-three Gallons Whisky, supra, as follows:

> While the Court holds that by a certain clause in the treaty by which the *locus in quo* was ceded by the In-

> dians, it remains Indian Country until they remove from it. The whole opinion goes upon the hypothesis that when the Indian title is extinguished, it ceases to be Indian Country, unless some such reservation takes it out of the rule.

It will be noted that the treaty with the Red Lake and Pembina band of Chippewa Indians, ceding to the United States a portion of their land was concluded on October 2, 1863, and it was under this treaty and under the condition then existing, and under the policy then pursued by the United States in the government of Indians, that the decision in United States v. Forty-three Gallons Whisky, supra, was based.

The distinction between that case and the case at bar is apparent and well defined. There was nothing in that treaty looking to the dissolution of the tribal relation of the Indians, the tribes remaining intact, and at that time the policy of the Government was to deal with the Indians by treaties, and as a people distinct from the citizenry of the nation.

By the act of March 3, 1871, 16 Stat. L. 556, it is provided:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty.

Referring to the act of Congress above quoted, this Court has said:

> After an experience of one hundred years of treaty-making system of government, Congress has determined upon a new departure—to govern them by acts of Congress.
>
> United States v. Kagama, 118, U. S. 375.

And in the matter of Heff, 198 U. S., page 498-499, says:

> From that time on, the Indian tribes and individual members thereof, had been subject to direct legislation of Congress, which for some time thereafter continued the policy of locating the tribes of separate reservations, and perpetuating the communal of tribal life. * * * * * Of late years, a new policy has found expression in the legislation of Congress, a policy which looks to the breaking up of tribal relations, the establishing of separate Indians in individual homes, free from national guardianship, and charged with all the rights and obligations of citizens of the United States."

It is under these later conditions, and the present policy of the government, and of Congress, that we must view the statute under which the respondent was convicted—interpret and construe it in reference to the agreement of May 1, 1893, with the Nez Perces; test its constitutionality, and weigh the power of Congress to reserve partial sovereignty within the former Nez Perce reservation.

The very effect and purpose of the agreement of May 1, 1893, with the Nez Perces was to break up the tribal relations; to dissolve the tribal entity; to do away with the last remnant of inter-tribal customs, government, and police control; to remove the very machinery of government supervision and control, and renounce the guardianship of the government over the persons of the Indians; to renounce as well anything like a general guardianship over even the property of the Indian—the Indian being left free to hold property and contract for himself in reference thereto, save a restriction upon the alienation of land patented to him by the government.

In fact, the Government of the United States, by the very act of ratifying the said agreement with the Nez Perces, not only renounced its guardianship of the person and general property of every Indian of the former Nez Perce tribe, but practically destroyed the very machinery by which the Indians could govern themselves.

Unless the sixteen hundred Indians immediately become full citizens of the state of Idaho, and, in fact, subject to all its laws, both civil and criminal, upon the acceptance of land in severalty, as provided by the act of February 8, 1887, then they are without government or means of government; their political and civil status an anomaly suspended in the air between the sovereignty of the state and the sovereignty of the nation.

The Honorable Solicitor General, as we understand his argument, contends that there can be such a thing as qualified citizenship—that is, that it was competent for Congress to confer upon the Indians such citizenship as would entitle them to all the rights of citizens of the state where they were located, and at the same time, deny to the state the right to subject them to the same complete and exclusive police control that it may its other citizens.

> Equality of rights and of responsibilities is an incident of citizenship, and those Indians who have become citizens may be likened to the negroes in this country since their enfranchisement by the fifteenth amendment to the constitution, of whom the supreme court, in an opinion written by Mr. Justice Bradley, has said: "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected." Civil Rights Cases, 109 U. S. 25.
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> In Celestine, 114 Fed. 551-553.

We are entitled to presume that the political department of the government, before alloting the land in severalty to the Nez Perces, and thereby conferring upon them the rights and corresponding responsibilities of citizenship, had

determined that the members of that tribe were sufficiently advanced in civilization to be safely intrusted with the immediate duties and grave responsibilities concomitant with such a status.

In fact, the Nez Perces are perhaps among the most enlightened and intelligent of the Indian tribes.

Even if the reverse were true, Congress was without power under the constitution to renounce the government duty of police control of these people, to break up their tribal relations, and distribute them among the white citizens of Idaho, clothed with all the rights of ordinary citizens and freed from the restriction of government control, and, at the same time, to deny to the state the same full control it has over its other citizens.

The Supreme Court of Kansas, in a recent case, cited with approval by this Court, in re Heff, supra, says:

> Congress, by authorizing the leasing and the sale of lands by the allottees with the approval of the secretary of the interior, encouraged the whites to go among the Indians and upon their lands, not with the view of benefitting the white man, but with the view of giving to the Indians better environments and developing their lands. We are not to presume that Congress would encourage the white man to go with his family among and upon the lands of the Indian for the benefit of the Indian, and not protect him, his family, and his property against the depredations and lawlessness of the Indian, unrestrained other than by the laws of the tribe to which he belongs. * * * * * * It is not to be presumed that the rights of citizenship would be conferred upon the allottee for his benefit, and he be for a period of twenty-five years exempted from the operation of the laws of the state of which he became a citizen, and, aside from those crimes specifically mentioned in the act of March 3, 1885, be restrained only by a code of laws based upon the primitive ideas and

standards of a tribal council. An Indian upon whom has been conferred citizenship and who enjoys the protection of the laws of the state, should be punished for a transgression of them. This we are to presume Congress contemplated.

In re Now-gee-Zhuck, 76 Pacific, 877-880.

This reasoning of the Supreme Court of Kansas is peculiarly applicable to the condition of the Nez Perces existing at the time of the allotment, and since developed upon their former reservation.

The Nez Perce reservation consisted of over thirty townships, or something like 700,000 acres of land.

The reservation was at this time, and for many years prior thereto has been, surrounded by settled communities. The Indians for years had mingled freely with the white settlers. Practically all the younger Indians were versed in the English language. Probably a majority of the Indians had adopted the Christian religion, and, as a whole, the tribe was far advanced in civilization.

The topography of the reservation is peculiar. The Clearwater river traverses the reservation in a northeasterly direction for nearly seventy miles. The general elevation above sea level of the valley of the Clearwater is from six to seven hundred feet. Lying west of the Clearwater valley, at an altitude of nearly 3,000 feet above sea level, is a level plateau of prairie lands, having an area of several hundred thousand acres.

The Indians were in actual occupancy only of the river valley. Practically none of the Indians ever lived upon or occupied the high lands.

Upon the taking of allotments in severalty, the Indians selected for their homes the low lands in the valley of the Clearwater and its tributaries. It is true several hundred allotments were taken upon the high prairie lands, but with perhaps less than a score of exceptions, these lands have never

been occupied by Indians as homes, but have been leased to the whites. The Indian owners continued to live in the settlements along the river.

Since opening the ceded lands for settlement in November, 1895, practically all of the ceded lands have been located under the homestead and townsite laws, and a large portion thereof has since been conveyed by patent to the settlers without any restriction whatever in the patent against the use and occupation of the land for any purpose.

The white population upon the ceded lands within the former reservation today numbers little less than 10,000 people. There are several towns thereon incorporated under the laws of Idaho, among which are Nezperce, with a population of one thousand, Culdesac, Stites, Kooskia, Peck, Ilo, Mohler, Orofino, Kamiah, Gifford and a number of other towns and villages each having a population of several hundred people.

The upland plateau I have mentioned is now practically a vast grain field of several hundred thousand acres producing annually six or seven million bushels of grain.

Congress must have anticipated such results from the opening of this vast territory to settlement. It is but the repetition of many a like chapter inthe history of the settlement of the fertile prairie lands of the west.

It is no longer a question of the government protecting the Indians and feeble frontier settlements of whites from the demoralization and danger of the intoxication of savages.

The Nez Perce Indians of today as a whole, are not so much worse than their white brothers in their tendency to use intoxicating liquors to excess. I believe I am entirely conservative in saying that there are not exceeding one hundred Indians among the entire band of Nez Perces who drink liquor to an extent to cause any serious injury to themselves, or any annoyance to the white settlers.

The motive for establishing saloons upon the reservation is not at all for the purpose of engaging in traffic with the

Indians, but for the purpose of furnishing liquors desired by the white settlers for mechanical and medicinal purposes, and as a beverage. It is safe to say that not 3 per cent of the liquors introduced upon the former Nez Perce reservation are consumed by Indians.

It is not a question of regulating commerce among the Indian tribes, for there are no Indians here living in tribal relations, nor even is it to any controlling degree a question of commerce with individual Indian citizens, but it is essentially and pre-eminently a question of regulation of the liquor traffic among the white citizens of the state.

The danger of any encroachment upon the system of independent local self-government contemplated by our constitution is well illustrated by the conditions prevailing in the former Nez Perce reservation prior to the decision of the Circuit Court of Appeals in this case, holding that the state had jurisdiction in the premises.

In every town and even in every little hamlet and crossroad throughout the reservation were men engaged in the illicit sale of intoxicating liquors. The government, from the fact that it has no organized system of local police or constabulary, has been powerless to suppress or even regulate this traffic. In many instances, the men engaged in this traffic were criminals of the worst type, and their places of business, commonly called "boot-legging joints" were the headquarters of gamblers and criminals, and breeding places of vice.

Since the decision of the Circuit Court of Appeals, the state has assumed jurisdiction over this territory and brought the same within its system of high license control. The boot-legging joint has entirely disappeared, and in its place is the licensed saloon, subject to constant inspection and control by the local police officers of the state, and of the municipality wherein such saloon is located.

Thus, the Indian shares with the white citizen a better and healthier condition of civic life under state control.

I have referred to the history and conditions of the Nez Perces perhaps to an extent that might seem to go beyond the matters shown by the record herein. I am induced to do so partly from the fact that the Honorable Solicitor General, in the brief accompanying his petition for certorari, page 27, quotes freely from the report of the Commissioner of Indian Affairs, in reference to some of these matters, and principally because I deem all the matters of fact that I have stated to be matters of history, and general public knowledge within the districts of Idaho, of which the United States courts may take judicial knowledge, and because the considerations I have suggested in connection with the agreement with the Nez Perces, and the various acts of Congress in the premises, show conclusively that it must have been the intention of Congress to terminate the tribal relations with the Nez Perces, and that the effect of all this legislation has been to bring about a state of affairs entirely inconsistent with the idea that the political department of this government still retains any such general control over the persons of the Indians as is inconsistent with the intention of Congress to renounce entirely its guardianship over the persons of the Indians.

I could not better illustrate the reverse conditions upon which the earlier decisions are based sustaining the jurisdiction of the United States over Indians, than by quoting the views of this court expressed in an opinion by Mr. Justice Miller, in a decision sustaining a conviction in the United States Court of an Indian of the crime of murder, wherein the tribal status of the Indian and consequent non-allegiance to the state are clearly made the controlling consideration.

> Its effect (the statute under consideration) is confined to the *acts of an Indian of some tribe*, or a criminal character, committed within the limits of the reservation. It seems to us that this is within the competency of Congress.
>
> These *Indian Tribes* are the wards of the Nation. They are communities dependent on the United States:

dependent largely for their daily food; dependent for their political rights. *They owe no allegiance to the States and receive from them no protection.* Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by Congress, and by this court whenever the question has arisen."

United States v. Kagama, 118 U. S. 375-385.

In the brief file in No. 557, in opposition to the application for the writ of certiorari herein, at pages 12-13, I suggested that the provisions of Section 19, Article 21 of the Constitution of the State of Idaho, providing, in effect, that the jurisdiction of the United States over the lands owned by Indians and Indian tribes should continue only until the Indian title thereto should be extinguished, as expressly ratified by act of Congress of June 3, 1890, admitting Idaho as a state, amounted to a compact between the United States and the State of Idaho granting the state exclusive jurisdiction over such Indian reservations for all purposes of police control, *as soon as the title should be extinguished*; and that, inasmuch as by the subsequent agreement of May 1, 1893, with the Nez Perces, as ratified by act of Congress, August 15, 1904, 28 Stats. 332, the Indian title was extinguished, Congress was without authority to reserve jurisdiction over the land ceded after the *Indian title had been extinguished*, especially after the title thereto had, as in the case at bar, passed from the United States to citizens of Idaho under the townsite laws, without any restrictions in the government patent.

Upon this point, this court, in a case involving the construction of similar provisions in the Constitution of the

State of Montana, and in the act of Congress admitting that state to the Union, has said:

> In February, 1887, by a general law, congress provided for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the territories over the Indians, and for other purposes. 24 Stat. 388. The act in question contemplated the gradual extinction of Indian reservations and Indian titles by the allotment of such lands to the Indians in severalty. It provided in Sections 6 'that upon the completion of said allotments and the patenting of said lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside.' But the act at the same time put limitations and restrictions upon the power of the Indians to sell, incumber, or deal with the lands thus to be alloted. * * From these enactments it clearly follows that at the time of the admission of Montana into the Union, and the use in the enabling act of the restrictive words here relied upon, there was a condition of things provided for by the statute law of the United States, and contemplated to arise, where the reservation of jurisdiction and control over the Indian lands would become essential to prevent any implication of the *power of the state to frustate the limitations imposed by the laws of the United States upon the title of lands* once in an Indian reservation, but which *had become extinct by allotment in severalty*, and in which contingency the *Indians themselves would have passed under the authority and control of the state.*

Draper v. United States, 164, U. S. 240.

And in discussing the act of Congress admitting Colorado into the Union as a state, this court has said:

> The act of March 3, 1905, necessarily repeals the provisions of any prior statute or of any existing treaty which are clearly inconsistent therewith. Case of the Cherokee Tobacco, 11, Wall. 616. Whenever, upon the admission of a state into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. * * * * * * * The record before us presents no question under the provisions of the treaty as to the punishment of crimes committed by or against Indians, the protection of the Indian in their improvements, or the regulation by Congress of the alienation and descent of property and the government and internal police of the Indians.
>
> United States v. McBratney, 104, U. S. 621-624.

Applying the principles declared by this court in Draper vs. United States, and in United States vs. McBratney, supra, to the question of jurisdiction of the United States over lands ceded by the Nez Perces, the jurisdiction of the United States would be limited to the protection of the lands allotted from alienation or encumbrance, and incidentally, perhaps, the protection of the improvements upon said lands, for, as suggested in Draper v. United States, the Indians themselves, by act of taking allotments in severalty under the provisions of the law of 1887, have passed under the authority and control of the state, and are subject to its laws, both civil and criminal, and therefore, crimes committed by or against Indians are to be punished the same as crimes committed by or against the white citizens, and all questions of the government and internal police of the Indians become inapplicable, as such functions cannot properly be exercised by the United States over citizens of the state in their intercourse and commerce with each other within the state.

The United States v. Rickert, 188, U. S. 432, cited by th Honorable Solicitor General, is clearly distinguished by this court in re Heff, in as far as it was relation to the

issues in the case at bar. What is said therein in reference to the Indians being wards of the government, when read in light of the entire decision, only goes to the extent of a special guardianship for the purpose of protecting the lands alloted and the personal property given the Indians by the government to aid them in adopting the ways of civilization. There is nothing in that decision that suggests that the government retains any control over the person of the Indians after they become citizens. It is with this latter question, and not with the property rights of Indians, that the case at bar has to do. In this case the introduction of the liquor was not upon an Indian allottment, but upon lands admitted to be owned in fee by white citizens of Idaho

SUMMARY OF MATTERS SHOWN BY TRANSCRIPT OF RECORD.

The petition for Writ of Habeas Corpus and Certiorari sets up all of the proceedings in the District Court upon which the imprisonment of the pettitioner is based. (Transcript, pages 1-12.)

The ground for relief is stated generally as follows: (Transcript, Folio 2, page 2.

That the indictment did not charge a public offense, or establish a violation of 29 Stat. L. 506, "and that the said statute in as far as it assumes to punish as an offense against the laws of the United States, the bringing of liquor within the limits of this state, and not reserved by the government for the exclusive use of Indians, is unconstitutional and void; and for the further reason that the court has no jurisdiction of the subject matter of the offense charged, or attempted to be alleged in the indictment, or over the person of the defendant for the reasons above stated."

The petition, (Transcript, folio 5-10, pages 2-5) in detail, be reference to the pleadings, evidence and instructions of the court, shows: that it is a conceded and uncontro-

verted fact that the only act done by the petitioner upon which the conviction and imprisonment of the defendant was based, was to buy a bottle of whiskey in the Village of Culdesac, and deliver it at the door of the building of a Nez Perce Indian, who had theretofore taken his land in severalty, and to whom a trust patent had issued; and that in no wise in any of the proceedings in the District Court was the claim made that the indictment was founded upon any other transaction, than as before stated, nor that any other state of fact was proven, nor any other issues submitted to the jury, nor that there was any claim, or pretense even, that Culdesac is upon lands reserved for any Indian or government purpose, or that said village is even upon an Indian allotment.

The petition further shows that the petitioner in the District Court protested against these proceedings, and challenged the jurisdiction of the court at every step upon the identical grounds urged in his petition for habeas corpus and certiorari;—by demurrer to jurisdiction, exhibit "B", Folio 15, page 7; by objection to the introduction of evidence, folio 4; (see also folio 50, page 24) by rejquests for instructions and exceptions to the charge of the court, folio 6; (see also folio 56, pages 27-28) and by motion in arrest of judgment, exhibit "D," folio 19, page 9.

The petition further says (Folio 11, page 5:

> For the foregoing reasons and for the further reason that the Hon. James H. Beatty, judge of the United States District Court for the district of Idaho, under whose jurisdiction your petitioner is now confined and restrained of his liberty, has passed upon all the questions presented and raised by this application, holding against the contention of your petitioner, making such application to the distret judge a useless procedure and on account of the delays incident to appeal therefrom, your petitioner has no plain, speedy, or any adequate remedy at law, therefore this application is presented direct to the Hon. United States Circuit Court of Appeals."

Petitioner prays (folio 11, page 5) for writ of habeas corpus, and for writ of certiorari.

The theory upon which the petitioner was tried and convicted is clearly shown by the opinion of the Honorable District Judge overruling the demurrer to the jurisdiction of the court, and in the instructions to the jury.

The opinion in no wise suggests that a clear issue of law is not presented challenging the jurisdiction of the Court, and upholds the indictment and retains jurisdiction solely upon the grounds that the *entire* former Nez Perce reservation is still Indian country, and that *all the* Nez Perce Indians are still wards of the government and not citizens, notwithstanding, it is conceded that they have received allotments in severalty. The court says (Transcript, folio 71, page 35):

> "It leaves *the entire reservation* and *all the Indian allottes* thereof for 25 years from May 1, 1893, subject to all the United States laws prohibiting the introduction of intoxicants into the reservation or the disposition thereof to the Indians. If, now, this is inconsistent with those provisions of the former act under which the Supreme Court has held that Indian allottees are entitled to citizenship, and are not subject to the laws concerning intoxicants, it must follow that these *provisions of the act of* 1887 *are not applicable to the Nez Perce to the laws of the state, but are* still the wards of the nation at least so far as concerns the laws regulating the sale of intoxicants."

The entire instruction given to the jury was as follows, (Transcript, folio 55, page 27):

> Gentlemen: The only instruction I need to give you is this: If you find that the defendant had this bottle of whiskey upon him *within the limits of what is known as Nez Perce Indian Reservation*, then you are to find him guilty of this charge. The charge, of course, is for *introducing liquor into the reservation*, but I instruct

you that having it in his possession upon the reservation *is conclusive.* When and where he bought it is immaterial; that it was in his possession within the limits of the Indian reservation is sufficient. *I instruct you as a matter of fact, that Culdesac is within the limits of the reservation.*"

The opinion of the learned District Judge, as well as the instructions to the jury, not only settles the question that the *locus in quo* of the alleged offense charged in the indictment, as well as the facts of the transactions relied upon to support the jurisdiction of the court are, and were conceded by the government at every step of the proceeding to be, as we have herein contended; but it does more, we are brought face to face with the startling proposition that the *act of 1887 is not applicable to the Nez Perce Indians,* and that they are *neither citizens nor subject to the laws of the state.*

Not subject to the laws of the state! Then to what laws are they subject? The tribal community has been disolved, the government no longer maintains any machinery to police the reservation; the Indians are left free to roam at will; ten thousand white settlers, at the invitation of the government, have settled upon the former reservation. Where, if not in the state, is vested the jurisdiction and the power to protect the family and property of these citizens of Idaho?

But to analyze the charge of the Court. The jury is told that "the charge—of course, is for *introducing liquor* upon the reservation, but I instruct you that having it in his *possession* upon the reservation is *conclusive.*"

It would seem to me that this not only denies to the defendant the presumption of innocence, but denies him even the right to prove his innocence.

In fact, the evidence offered by the government shows affirmatively that the defendant did not introduce the liquor, and that the only dominion or control that he exercised over the whiskey either directly or indirectly, was to purchase the same at a certain place within the town of Culdesac, and

immediately dispose of the same there. (Transcript, folio 51, page 25; folio 53-54, page 26.)

It will be noted that the defendant was not charged with *selling or giving* the liquor to Indians, but of *introducing* liquor into the Indian country.

The petitioner himself is a Umatilla Indian, and the Indians with whom he divided the liquor were Nez Perces who had taken allotments in severalty.

For the offense of being sociable with his Indian fellow citizens, the Umatilla Indian Dick, the petitioner herein, is now serving a term in the Idaho Penitentiary.

Thus, if the government's position as to the status of Indian allottees be true, does the benificent guardian and instructor tenderly wrap the the mantle of protection around the Indian ward and pupil.

Again, to apply the doctrine of the learned District Judge to the ten thousand white settlers within the former reservation, each and every one of them who may have a half pint of wine or brandy in their possession, whether it is for medicinal or household use, or for however needful, innocent, or lawful purpose, is *conclusively presumed* to be *guilty*, and may be sent to the penitentiary.

The conclusion to which this contention leads is an efficient demonstration of the fallacy of the government's provision that congress intended the act of 1897, 29 Stat. L. 506, under which petitioner is imprisoned, to apply to the lands patented to white settlers. It certainly is a striking illustration of the confusion and anomoly to which a divided sovereignty in matters of police control may lead.

Yet, the petitioner by the application of such doctrine,—charged under such unconstitutional statute was committed to prison, though protesting against such invasion of his constitutional rights in every lawful way in the District Court; and when he applied for relief in the Circuit Court of Appeals by Writ of Habeas Corpus and Certiorari, the govern-

ment submits without protest to the jurisdiction of that court to so review the decision of the District Court; and it is here for the first time that petitioner is met by the contention that he had a plain and speedy remedy by appeal or writ of error, and further, that the Circuit Court of Appeals is without jurisdiction to issue writs of habeas corpus.

As to the first contention, I submit that any citizen is entitled to the writ of habeas corpus as a matter of right, whenever imprisoned without authority of law under an unconstitutional statute, especially when the highest court of the land has theretofore clearly declared such statute to be unconstitutional, and where the inferior court declines to follow such decision.

In respondent's brief filed in opposition to the application for writ of certiorari (pages 4-9), I have discussed the question of the jurisdiction of the Circuit Court of Appeals to issue writs of habeas corpus, and now submit that question without further argument, believing that a reasonable construction of the Circuit Court of Appeal's act with a view of giving full effect to the general purpose to be accomplished by the creation of said court, will lead to the conclusion that it was intended to confer this power upon said court by the provisions of Section 12 of said act, wherein the Circuit Court of Appeals is granted all the powers specified in Section 716 Revised Statutes.

I would further direct the attention of the court to the fact that in the case at bar the Circuit Court of Appeals issued a *writ of certiorari* to the District Court (Transcript, folio 80, page 38), and that such writ was returned, and all the proceedings were thus brought before the Circuit Court of Appeals, and it was upon such return, that the Circuit Court of Appeals made this order discharging the prisoner (Transcript, folio 89, pages 40-43).

I think the Circuit Court of Appeals clearly had jurisdiction to issue such writ of certiorari under the provisions of section 716 of the Revised Statutes, which is expressly made applicable to the Circuit Court of Appeals by Section

12 of the act creating that Court, and which section empowers such court to issue such writs as *"may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law,"* and that such proceedings were clearly within the jurisdiction of the Circuit Court of Appeals. At most, it could only be urged that there was an irregularity of practice. This, we by no means concede, but in any event objection should have been made to such alleged irregularities in the Circuit Court of Appeals, and it cannot be raised here for the first time.

We submit further, that in no event under a record showing conclusively that the petitioner in a habeas corpus proceeding is unlawfully imprisoned, should this court exercise its discretionary power of review, over the Circuit Court of Appeals for the purpose of *re-instating a a void judgment or remanding the respondent to an unlawful imprisonment.*

In addition to the authorities herein cited, we would particularly direct the attention of the court to that portion of respondent's brief in opposition to the writ of certiorari (pages 10-16), wherein I discussed in detail some of the matters bearing upon the question of the jurisdiction of the United States for the purpose of police control over the territory embraced within the Village of Culdesac.

In the last analysis the one vital question at issue in the case at bar is: "Can a divided sovereignty for the purpose of police control exist under our system of government. We understood this question to have been absolutely settled by this Court in the matter of Heff, and as suggested before an examination of the brief of the Honorable Solicitor General in the matter of Heff, as well as the decision of the Court therein, shows that all the considerations now urged by the government in favor of qualified citizenship or a divided sovereignty, were substantially urged in the former case, and explicity passed upon adversely to the government's position. I do not understand that any new doctrine was enunciated by this court in the Heff case, but if there are any decisions of this court holding contrary thereto, certainly

those decisions must be considered as overruled or distinguished in as far as they may be urged as precedents for upholding the constitutionality of any law attempting to provide for a qualified citizenship or a divided sovereignty.

Respectfully submitted,

FRANK E. FOGG,

Attorney for Respondent.

No. 557.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

~~No. 449.~~

E. L. WHITNEY, WARDEN OF THE IDAHO STATE PENITENTIARY, PETITIONER,

vs.

GEORGE DICK, RESPONDENT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FRANK E. FOGG,
Attorney for Respondent.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 19922

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GEORGE DICK, RESPONDENT.

Brief of Respondent in Opposition to Petition for Writ of Certiorari.

The respondent submits at this time argument only upon such points as are deemed necessary in the consideration of the question of the issuance of the writ.

The propriety of the issuance of the writ must be measured solely by the provisions of section 6 of the Circuit Court of Appeals act.

The judgment of the Circuit Court of Appeals is final in *habeas corpus* proceedings in the sense and to the extent that a review by this court cannot be demanded as a matter of right.

This court, in its discretion, undoubtedly has jurisdiction to bring up any case in which judgment of the Circuit Court of Appeals is made final by said act.

The conditions and considerations under which this court will exercise such discretionary power are stated and defined in the decision of this court on the application for the writ in the matter of Lau Ow Bew *vs.* United States, 141 U. S., 583, as follows:

"It is evident that it is solely questions of gravity and importance that the Circuit Court of Appeals should certify to us for instructions, and it is only when such questions are involved that the power of this court to require a case in which the judgment and decree of the Circuit Court of Appeals is made final, to be certified, can be properly invoked.

"The inquiry upon the application, therefore, is, whenever the matter is of *sufficient importance* in itself and *sufficiently open to controversy*, to make it the duty of this court to issue the writ applied for in order that the case may be reviewed and determined as if brought here upon appeal or writ of error."

In the case last cited there was involved questions of the construction of the Chinese restriction act in the light of treaties between the governments of the United States and China. These exceptional matters of national importance the court in that case deemed sufficient for the issuance of the writ.

In the decision of the same case upon the merits, upon the return of the writ of certiorari, this court, again speaking of the practice in cases of this kind, after referring to the object of the act being to restrict appeals to this court except in certain cases, and that by its provisions the appellate jurisdiction was distributed between the two courts and judgment in certain classes of cases made final in the Circuit Court of Appeals, said:

"And as certiorari will only issue where questions of *gravity and importance* are involved, or in the interest of uniformity of decisions, the object of the act is thereby obtained."
Lau Ow Bew *vs.* United States, 144 U. S., 58.

Applying these settled principles to the case at bar, the inquiry, then, is, first, Does this case involve matters of peculiar and extraordinary gravity and importance? Second, Are the questions of law presented sufficiently open to doubt and controversy?

Subdivision 3 of rule 37 of this court provides "where application is made to this court under section 6 of said act to require a case to be certified to it for its review and determination, *a certified copy of the entire record* of the case in the Circuit Court of Appeals shall be furnished this court by the applicant as part of the application."

The purpose of this rule undoubtedly is to enable this court to have before it the entire case before issuance of the writ, so that it may make an examination sufficiently exhaustive to determine in advance of the issuance of the writ whether the matter presented is such when weighed by the criterions above stated as to impel the court to issue the writ.

The honorable solicitor general has failed to accompany his application with a certified copy of the proceedings in the Circuit Court of Appeals, as required by said rule 37, but has referred (on page No. 3 of his petition) to the fact that the record in the appeal from said judgment, Whitney *vs.* Dick, No. 494 of this term, has been printed and is referred to in his petition. Possibly we would be warranted in suggesting that the petition be denied for non-compliance with said rule No. 37. However, we prefer that the case be determined upon its merits, and in this brief will treat the printed records referred to in petitioner's application as being a part of the petition, the same as though fully incorporated therein.

The petitioner urges, as a matter of controlling importance, the consideration of the question of the authority of the Circuit Court of Appeals to issue the writ of *habeas corpus*. We submit, even if this court should determine that the Circuit Court of Appeals was entirely without authority to

issue the writ of *habeas corpus*, that this in itself would by no means be sufficient reason for the issuance of the writ of certiorari. Our reasons for this position, concisely stated, are as follows:

The facts set forth in the petition, and particularly the facts set forth in the record referred to in the petition, show, as we maintain, without serious doubt or controversy, that Dick, the respondent, was unlawfully imprisoned and was entitled to his discharge.

Under petitioner's own showing, if the settled law warrants our view, this court is asked to issue the writ of certiorari when the only function it could serve would be, in effect, to reinstate a void judgment to remand respondent to an unlawful imprisonment.

If the same facts stated in the petition and incorporated therein, by reference, were presented here upon original application for a writ of *habeas corpus* on behalf of the respondent, Dick, this court would order his discharge.

The challenge to the jurisdiction made by the petitioner herein for the first time goes to the entire record presented here by petitioner. The primary defect in the jurisdiction was in the district court. It seems to us that the petitioner is not entitled to be relieved even of a void judgment of the Circuit Court of Appeals under a showing that he is now detaining respondent under a judgment of the district court entirely void because of the total lack of jurisdiction of said court.

CIRCUIT COURT OF APPEALS JURISDICTION IN HABEAS CORPUS CASES.

An examination of the authorities cited by the honorable solicitor general convinces us that his position that the Circuit Court of Appeals is without authority to issue the writ of *habeas corpus* is untenable.

The various statutes relating to the power of Federal courts to issue this writ should receive, in our judgment,

broad construction in the light of the paramount importance that was attached to this writ by the framers of the Constitution, and, in view of the uniform course of the decisions of this court, giving always to those statutes a construction sufficiently broad to enable *all its courts* within their respective jurisdictions to relieve from unlawful imprisonment in all cases where the same was under the color of Federal authority or in violation of rights under the Constitution and laws of the United States, and applying the rule of strict construction contended for by the honorable solicitor general only when the writ was invoked in cases tending to invade the legitimate province and jurisdiction of the State courts.

Chief Justice Marshall, in *Ex parte* Bollman, 4 Cranch, 95, said:

"Congress, acting under the immediate influence of this injunction (article 1, section 9), must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity: for, if the means be not in existence the privilege itself would be lost although no law for its suspension should be enacted. Under the influence of this obligation they gave to *all the courts* the power of awarding writs of *habeas corpus*."

Speaking of the contention made in that case, that the Supreme Court was without authority to issue the writ under statute which, in terms, gave that authority only to the justices, Chief Justice Marshall said:

"It would be strange if the judge sitting on the bench should be unable to hear a motion for this writ where it might be openly made, and openly discussed, and might yet retire to his chambers and, in private, receive and decide upon the motion" (*Ex parte* Bollman, *supra*).

In *Ex parte* Dorr, 3 How., 104, 105, a strict construction of the statute is invoked as against the invasion of the jurisdiction of the State courts.

Ex parte Parks, 93 U. S., 22, decides that court would not discharge prisoner under commitment unless proceedings were entirely void.

Ex parte Hung Hang, 108 U. S., 552, is simply restrictive of the exercises of original jurisdiction by the Supreme Court.

In re Burrus, 156 U. S., 591, the court said the application for the writ "must be founded on some matter which justifies the exercise of Federal authority and which is necessary to the enforcement of rights under the Constitution, laws or treaties of the United States." And further says:

"*All courts* of the United States and the *justices and judges* of *all its courts*, are authorized to issue writs of *habeas corpus* when imprisonment is supposed to be in violation of the laws of the United States."

Neither does the view of Judge Cooley, as expressed in his work upon Statutory Limitations, seem to bear out the contention of the honorable solicitor general to the extent of invoking the rule of strict construction of the statutes in determining what particular courts of the United States have jurisdiction, and would seem to go only to the extent that the power of all courts of the United States are strictly limited to Federal matters, but as to those, all its courts are broadly granted power to issue the writ (Cooley's Statutory Limitations, 422).

Speaking of the provisions of the act of February 5, 1867, 4 Stat., 385, since incorporated with other provisions in section No. 753, Revised Statutes, in *Ex parte* McCurdle, 6 Wall., 318, Chief Justice Chase said:

"This legislation is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of *every court* and *every judge*, every possible case of privation of liberty contrary to the National Constitution, treaties or laws. It is impossible to widen this jurisdiction."

In *Ex parte* Caldwell, 138 Federal, 488, it is assumed that the right existing in the Federal courts to issue the writ is conferred by sections 716, 751, 752, and 753, Revised Statutes.

The honorable solicitor general contends that section 716, Revised Statutes, does not confer power upon the courts to issue writs of *habeas corpus*, but that the power is conferred to issue such writs solely by provisions of 751, 752, and 753, Revised Statutes, and that therefore the provision of section 12 of the Circuit Court of Appeals act, granting to that court all powers specified in said section 716, was not effective as conferring upon that court the power to issue writ of *habeas corpus*.

It would seem to us that said section 716 would, by its terms, be clearly sufficient to grant the power in all cases where such writs "*may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law.*"

Brushing aside mere technical rules of statutory construction, it seems to us clear that there is nothing in sections 751, 752, and 753 to indicate that the specific power granted by sections 751 and 752 was, in any manner, intended to restrict the power granted in general terms by said section 716 to *all courts* to issue this writ. Section 751 specifically grants this power to courts. Section 752 specifically grants this power to judges. Section 753 prohibits the issuance of the writ when persons are in jail under color of authority of the United States except under certain conditions. The purpose of these sections is not restrictive of the power of any court to issue this writ, but it does confer specifical power upon the judges of the court to issue the writ and restricts the conditions under which the writ shall be issued.

It was not necessary for Congress to adopt section 752 to confer power upon the judges of the Circuit Court of Appeals to issue this writ, as they already had the power by virtue of being either circuit or district judges. Neither was it

necessary in said act to refer to section 753, as that section related in no manner to the jurisdiction of courts to issue the writs, but to the right to the writ, whereas section 716 was a general section, authorizing the issuance of all the usual writs necessary to the exercise by all courts of their respective jurisdictions.

By section 4 of Circuit Court of Appeals act all appellate jurisdiction was taken from circuit courts and was conferred upon the Circuit Court of Appeals. Having deprived the circuit courts entirely of their appellate or supervisory control over the district courts and conferred this power upon the Circuit Court of Appeals, the presumption is strong that Congress intended to give to the Circuit Court of Appeals jurisdiction to issue all such writs as have ordinarily been considered necessary for the convenient exercise of such supervisory functions. The issuance of the writ of *habeas corpus* by an appellate court, under our system of practice, has always been considered a part of the machinery by which it indirectly exercises its supervisory power over courts of inferior jurisdiction.

In *Ex parte* Caldwell, 138 Fed., 488, the court says:

"It will thus be seen that the power of the Federal courts to issue this writ is coextensive with the common-law power, provided only that it be not used for delivery of prisoners in jail, except in cases specified."

The question of the power of the Circuit Court of Appeals to issue the writ of *habeas corpus* does not seem to have been passed upon directly by this court, but it seems to have been assumed in the decision in the case of *In re* Heff, 197 U. S., 488. We find the following statement by the court on page 489:

"The Court of Appeals of the 8th circuit, having decided the questions involved adversely to his contention, he presented this application for writ of *habeas corpus* directly to this court."

We take this to be a suggestion that his application would more properly have been presented to the Circuit Court of Appeals, excepting that the adverse decision of that court upon the same questions prevented an effectual remedy in that court.

The Circuit Court of Appeals of the eighth circuit has assumed jurisdiction to issue the writ *In re* Levitt, 117 Federal Reporter, 448. The Circuit Court of Appeals in the fourth circuit concludes that there can be no question as to the power of that court to issue the writ of *habeas corpus* (*In re* Buskirk, 72 Federal, 14–22).

The very purpose of the Circuit Court of Appeals act was to relieve this court of the great burden imposed under the then existing system incident to the growth of the country since the organization of the court. It was the intention of Congress to create a court of broad and comprehensive appelate and supervisory powers over the district and circuit courts, and with this in view no good reasons suggest themselves why this court should not have been entrusted with the issuance of the writ of *habeas corpus*, with powers coextensive, at least, with the circuit courts, to the appellate jurisdiction of which it entirely succeeded. Construing the act in the light of these considerations, we have no doubt that it was intended to confer this power by the provisions of section 12 of said act, wherein the Circuit Court of Appeals is granted all the powers specified in section 716 of the Revised Statutes.

Another important consideration favoring such construction is the fact that at all times since the organization of this Government all of its courts of record and of general jurisdiction have been entrusted with the power of the issuance of writs of *habeas corpus*. There seems to have been a consistent purpose on the part of Congress to give to the provisions of article 1, section 9, of the Constitution its fullest efficiency by granting the power to issue writs of *habeas corpus* to all of the Federal courts.

MATTERS INVOLVED NOT SUFFICIENTLY OPEN TO CONTROVERSY.

Herein we shall only discuss the matters presented by the honorable solicitor general in the second section of his brief with a view of considering whether or not the matters of law involved are sufficiently open to controversy or doubt to warrant the issuance of the writ of certiorari.

We maintain that an examination of the petition and record shows that all the vital and essential questions of law involved have been plainly, explicitly, and conclusively settled and determined by this court adversely to the petitioner's contention in the case of *In re* Heff, 197 U. S., 488.

It is conceded by the solicitor general in his petition (page 2), and is conclusively shown by the record, that the respondent, George Dick, was convicted in the district court of Idaho of the offense of introducing liquor into the former Nez Perce Indian reservation.

It is conceded that the alleged offense was committed in the village of Culdesac, a municipal organization of the State of Idaho, which is located upon lands to which the Indian title had been extinguished, and the title of which had passed from the United States to the probate judge of Nez Perce county in trust for the inhabitants of said village of Culdesac. There is no dispute whatever about any of these facts.

There is no contention on behalf of petitioner that the place where the alleged offense was committed is an Indian reservation or a place reserved by the Government for the use or control of Indians or for any other Government purpose.

The single issue of law only is clearly presented: Has the United States jurisdiction, for the purpose of police control, over the territory embraced within the said village of Culdesac?

The honorable solicitor general contends that the United States has jurisdiction because of a clause in a treaty or

agreement with the Nez Perce Indians, ratified on the 3d day of May, 1903, providing, in substance, that the laws of the United States prohibiting the introduction of liquor into the Indian country shall remain in force over the land ceded for a period of twenty-five years.

This position is untenable:

First. Because the effect of such an agreement, if upheld, would be to establish a divided sovereignty over certain definite territory for the purpose of police control, and to deprive the State of Idaho of full police control over its own citizens within its own territory, and therefore such an agreement is void, and the act of Congress tending to give it effect unconstitutional.

In re Heff, 197 U. S., 488.

Second. The agreement of the Nez Perce Indians, in so far as it attempted to provide for the future police control of the territory ceded, is void, it being against public policy for the Government to barter with its citizens to place limitation on its future policy in regard to matters of mere police regulation.

Boyd *vs.* Alabama, 94 U. S., 650.
New York & N. E. R. R. *vs.* Bristol, 151 U. S., 567.
Holden *vs.* Hardy, 169 U. S., 392.

Third. The agreement of the Nez Perces, as ratified by an act of Congress, dissolved the tribal relations of the Nez Perces, and, by acceptance of allotments, all members of that tribe became citizens of the State of Idaho and subject to all the laws of that State, both civil and criminal. The clause in the so-called treaty providing that the laws prohibiting the sale of liquor shall continue in full force for twenty-five years, etc., cannot be considered a contract. The Nez Perce tribe, as an entity, was destroyed by the very terms of this agreement. The agreement does not purport to run for the benefit of the individual Indians, and if it

could be so construed would be contrary to public policy as a restraint upon the Government's police powers.

Fourth. The constitution of the State of Idaho, section 19, article 21, provides, among other things, in effect, that all lands owned or held by Indians or Indian tribes, *until the title thereto shall have been extinguished* by the United States, shall remain under the absolute jurisdiction and control of Congress.

By act of Congress approved July 3d, 1890, Idaho was admitted as a State.

Section 1 of said act provides, among other things, that the constitution as formed by the citizens of Idaho is *accepted, ratified, and confirmed.*

Section 2 defines the boundaries of the new State. No reservation is made of any portion of the Territory, excepting as expressed in the constitution, the ratification of which by Congress amounted to a sacred compact between the United States and the State of Idaho, granting to the State exclusive jurisdiction for all purposes of local police control over all territory included within its definite boundaries, excepting only lands belonging to Indians or Indian tribes, and this restriction to extend ONLY UNTIL SUCH TIME AS THE INDIAN TITLE SHOULD BE EXTINGUISHED.

It will be particularly noted that there is nothing in this contract between the United States and the State of Idaho that contemplates any such thing as a divided sovereignty. The jurisdiction over lands embraced in Indian reservations or belonging to Indian tribes shall remain under the *absolute jurisdiction and control of Congress* until the Indian title is extinguished.

There can be no question but what the United States could have retained its absolute jurisdiction for any length of time over these lands so reserved, and that it was entirely optional with the Government, acting through its Congress, to determine when it would release its control over the In-

dian reservations by the extinguishment of the Indian title But it was not in the power of Congress to turn over to the State of Idaho a partial and divided jurisdiction and sovereignty over these lands. It could not ask or require the State of Idaho to assume the responsibility of a divided jurisdiction and partial police control. It had authority only to retain absolute jurisdiction and control, or, by the extinguishment of the Indian title, to grant absolute jurisdiction and control to the State of Idaho.

It is conceded by the honorable solicitor general, and is conclusively shown by the record, that the Indian title has been extinguished to the lands included in the former Nez Perce reservation, including the territory embraced by the said village of Culdesac, and that the same has been granted by the United States to citizens of the State of Idaho without any restrictions.

It will be noted that this agreement was concluded with the Nez Perce Indians on May 1, 1893, long after Idaho had been admitted as a State.

The commissioners who concluded that agreement were appointed pursuant to the act of February 8, 1887 (24 Stats., 388), and under that statute were given no power whatever to insert such a provision in the agreement with the Indians.

It was contemplated by the very act under which the negotiation was authorized that the purpose of the negotiation should be to bring about the dissolution of the tribal relations of the Nez Perce Indians by allotting them lands in severalty, by the acceptance of which under the terms of said act they were to become citizens of the United States and subject to all the laws of the State of Idaho, both civil and criminal. It was contrary to the purpose and spirit of this act as well as to the policy of the Government that any restrictions should be placed either upon the responsibility of the Indians to the State or upon the control of the State over the Indians after the acceptance by him of his land in severalty.

Article V of the said agreement with the Nez Perces provided that the lands should not be open for settlement until the trust patents were issued and recorded, and it was evidently intended that the public should not be invited to settle upon the said reservation until such time as, under the law, the control and police jurisdiction over such reservation should pass from the Government of the United States to the government of the State of Idaho.

By the act of August 15, 1894, 28 Stats., 332, ratifying the said agreement, it is provided that immediately after issuing the trust patents the lands ceded shall be open for settlement and shall be subject to disposal under the land laws of the United States.

It does not seem to have been contemplated that the said article IX inserted in said agreement, relating to the introduction of intoxicating liquors, should be considered in any sense as a part of the consideration for the sale of the lands by the Indians. All of the several articles of the agreement providing for valuable considerations which should pass to the Indians were introduced with the clause, "It is hereby stipulated and agreed." Article IX, relating to the introduction of intoxicating liquors, as well as article X, relating to the payment of certain claims to Indians on account of service under General Howard, were introduced with the clause, "It is agreed." We think it is fair to presume that the Indians, or at least their intelligent advisers, understood that the commissioners had power only to recommend that these latter provisions be carried into effect and had no power to bind the Government in relation thereto.

However this may have been, Congress clearly was without power, in an act ratifying an agreement with the Indians or in any other way by any legislation, to violate the existing compact between the State of Idaho and the Government of the United States, or to divide the sovereignty for the purpose of police control over the territory ceded between the Federal and State governments.

The foregoing considerations, it seems, conclusively determine the fallacy of the Government's position that there is a question here of impairment of the contract with the Nez Perces.

These broad constitutional questions, clearly decided *In re* Heff, *supra*, are absolutely controlling as to the law upon the issues involved herein. Jurisdiction for the purpose of regulating the sale of liquor by a citizen of a State to a citizen of the same State belongs exclusively to the State and not to the United States; that in matters of police control there can be no such thing as a divided sovereignty; that jurisdiction belongs either to the State or to the United States, and cannot be divided between the two.

As we understand, the honorable solicitor general substantially concedes that to give the said agreement with the Nez Perces effect would divide the sovereignty for the purpose of police control over the territory embraced in the Nez Perces reservation between the State and Federal governments, but argues that it is within the power of Congress to do this, and that the decision of this court in the matter of Heff is not controlling.

We understand the decision of this court *In re* Heff, *supra*, to be explicit upon the point that there can be no exception to the rule; that a divided sovereignty for the purpose of police control is an impossibility under our system of government. This court in its decision, pages 506 and 507, *In re* Heff, *supra*, states the reason for this rule and cites The Kansas Indians, 5 Wall., 537, holding the Indians must be wholly subject to the United States until clothed with the rights and bound by all the duties of citizens, and United States *vs.* Dewell, 9 Wall., 41, holding that a police regulation embraced in an act of Congress can only have effect where the legislative authority of Congress excludes territorially *all State legislation*.

An examination of the brief of the honorable solicitor general in the Heff case, as well as the decision of the court

therein, shows that all the matters now urged by the honorable solicitor general in favor of the jurisdiction of the United States over the former Nez Perce reservation were substantially urged in the former case and were in that case explicitly passed upon adversely to the Government's position.

We conclude that under the petitioner's showing and under the conceded facts there is no such controversy as will warrant this court in issuing the writ of certiorari; that the record shows that the district court was wholly without jurisdiction, and that its judgment of conviction of the respondent of the offense was wholly void and the imprisonment of respondent thereunder illegal and wholly without authority of law, and that he was entitled to his discharge; that whether the Circuit Court of Appeals had or had not jurisdiction to issue the writ of *habeas corpus* that this court should not exercise its discretionary power to bring up such proceedings of the Circuit Court of Appeals for review, when it is manifest that in no event, under the conceded facts, could the respondent be remanded to imprisonment, and that because of these considerations the writ should be denied.

Respectfully submitted.

FRANK E. FOGG,
Attorney for Respondent.

BRIEF
FOR
RESPONDENT

FILE COPY.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1905.

No. 494

E. L. WHITNEY, Warden of the Idaho State Penitentiary,
Appellant.

vs.

GEORGE DICK,
Respondent.

No. 557

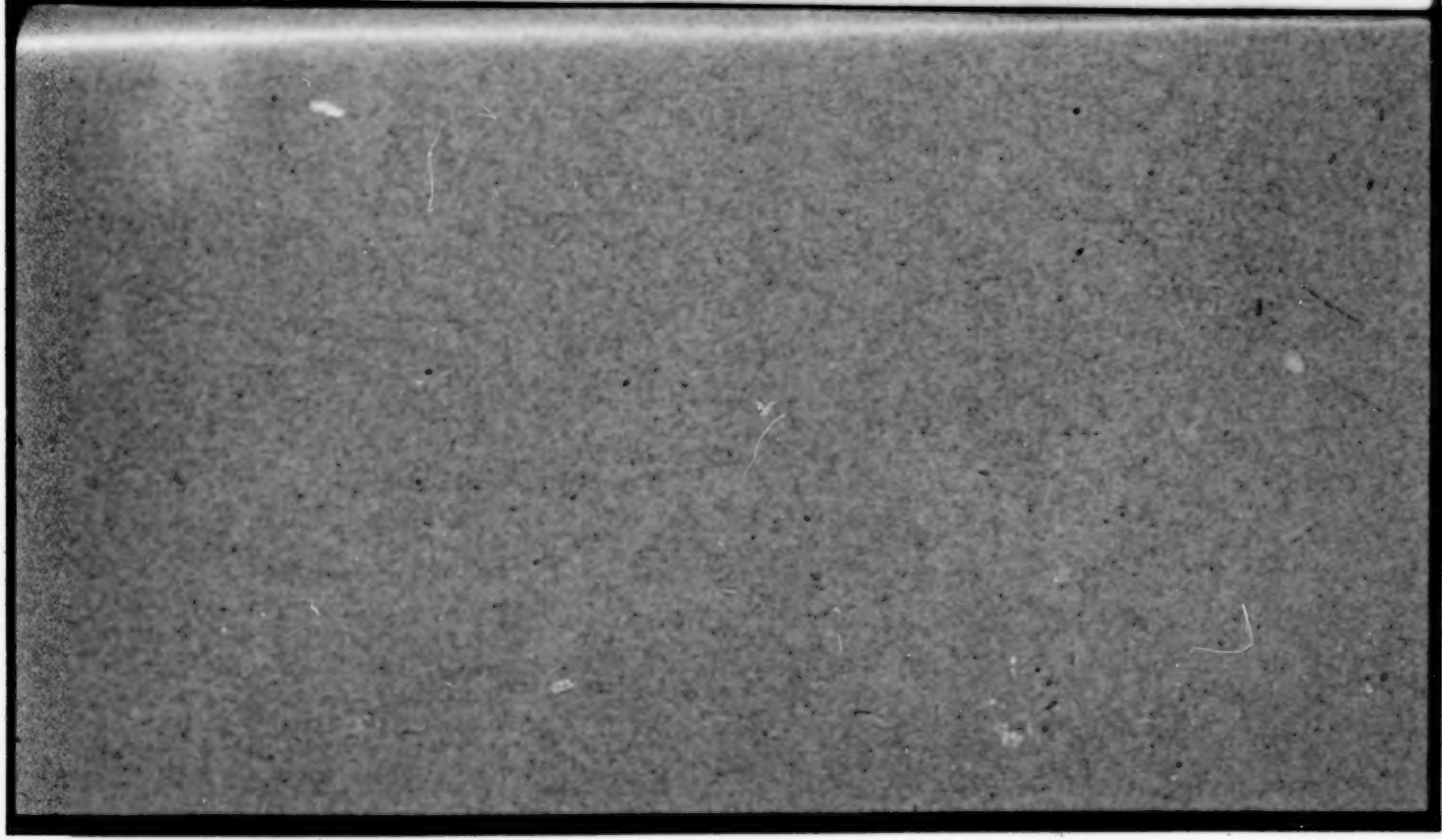
E. L. WHITNEY, Warden of the Idaho State Penitentiary,
Petitioner.

vs.

GEORGE DICK,
Respondent.

BRIEF OF RESPONDENT

FRANK E. FOGG,
Attorney for Respondent.



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BRIEF OF RESPONDENT

An order of this court having been made that the record in No. 494, this term, shall stand as the return to the Writ of Certiorari, issued in No. 557, and that both cases are advanced to be submitted on printed briefs, the respondent, believing that the issues in both cases are so nearly identical as to render their separate treatment unnecessary, asks the Court to consider this brief in each of the above named cases.

The questions involved in the case made upon the return to the Writ of Certiorari, as well as upon the appeal, were discussed in the brief heretofore filed by the respondent in opposition to the petition for the Writ of Certiorari, and I shall avoid as far as practicable, duplication of the points covered in that brief, and will submit the present brief as supplementary thereto.

Herein, I will first discuss the leading question involved: Has the United States jurisdiction for the purpose of local police control over territory within a state owned in fee by white citizens of such state, and not reserved for use and occupancy by Indians, nor for any government purpose whatsoever.

I shall assume, as I am confident the record fully warrants, that this question was squarely presented by proceedings clearly within the jurisdiction of the Circuit Court of Appeals, and is now properly before this Court for review.

Following this I shall briefly and specifically direct the attention of the Court to such matters, shown by the record and transcript herein, as may be necessary to fortify my position as above stated.

The Honorable Circuit Court of Appeals, in the decision in the case at bar, (Transcript, page 42) said:

> In the present case the sale of liquor was made in a municipal territory clearly within the jurisdiction of the State and outside the jurisdiction of the United States. With respect to such a case the Court in the case of Heff, supra said: "It will not be doubted that an act of Congress attempting as a police regulation to punish the sale of liquor by one citizen of a State to another within the territorial limits of that State would be an invasion of the State's jurisdiction and could not be sustained, and it would be immaterial what the antecendent status of either buyer of seller was. There is in these police matters no such thing as a divided sov-

ereignty. Jurisdiction is vested entirely in either the State or the nation, and not divided between the two." This statement of the law by the Supreme Court we think disposes of the present case.

I believe that the broad constitutional question decided in re Heff, 197 U. S. 505—that there can be in police matters *no such thing as a divided sovereignty,* is absolutely controlling in the case at bar, and that the respondent's case might well be submitted upon the simple statement of the foregoing proposition.

But in the present case there are even stronger reasons than were presented in the matter of Heff, supra, for denying to the United States jurisdiction in the premises.

In the matter of Heff, this Court based its decision upon the unconstitutionality of the act of January 30, 1897, 28 State. L. 506, in as far as that act attempted to control the sale of liquors to an Indian, to whom an allotment of land has been made, and who, by the act of receiving such allotment, had become, under the laws of the United States, a citizen of the United States, and of the state wherein he resides. While in the case at bar, I contend that even if the statute could be held constitutional the acts charged do not constitute an offense under the statute.

The indictment, conviction and commitment of the respondent, Dick, are founded upon the charge of introducing liquor in the village of Culdesac, an incorporated village within the State of Idaho. There is no dispute about the fact, indeed, there could be none, as the District Court of Idaho, as well as the Circuit Court of Appeals, and this Court we apprehend, takes judicial knowledge of the location of an incorporated town, and that under the laws of the United States, lands reserved for the use and occupation of Indians, or for any government purpose, could not be included within a patent of the United States to the inhabitants of a town under the townsite laws.

The Circuit Court of Appeals says: (Page 40-41 Transcript.)

> The Village of Culdesac is located upon land ceded to the Indian by the United States, about six or seven miles from the exterior boundary of the Indian School Reservation, and no reservation or any part of a reservation used for government purposes, or for Indian purposes is within the boundaries of such village. Prior to the transaction involved in this case the title to the lands upon which the village of Culdesac is located had passed from the United States by patent under the townsite laws to the Probate Judge of Nez Perce county, Idaho, in trust for the inhabitants of the village.

The respondent was indicted under the provisions of 29 Stat. L. 506, for introducing liquor into and upon the Nez Perce Indian reservation. (Transcript, page 12.) It will be noted that the charge is for introducing, not for the selling of liquor, and that the general allegation that the place to which the liquor was introduced was Indian country is controlled by the specific statement that it was upon the Nez Perce Indian reservation; but the Indian title to the Nez Perce reservation had long since been extinguished, and the territory formerly embraced therein consisted either of lands patented in fee to the settlers under the homestead and townsite laws, or of Indian allotments, or of public lands of the United States. These are facts of which the Court necessarily takes judicial knowledge, and unless the entire former Nez Perce reservation is to be deemed Indian country, within the terms of the statute upon which the prosecution was predicated, then the indictment charges no public offense.

The statute provides, among other things, as follows:

> Any person who shall introduce, or attempt to introduce any malt, spirits, or vinous liquors, * of any kind whatsoever, into the Indian country, which term shall include any Indian allotment, while the title to the same shall be held in trust by the government, or while

the same shall remain inalienable by the allottee, without the consent of the United States, shall be punished, etc.

29 Stat. L. 506.

This statute is subsequent to the act of congress ratifying the agreement with the Nez Perces, by which it was attempted to retain jurisdiction over the lands ceded by the Nez Perce Indians for the purpose of regulating the sale of intoxicating liquors, and amends the then existing laws, in so far as inconsistent in its provision. The fact that Congress provided that the term "Indian Country" should include any Indian allotment while the title to the same should be held in trust by the government would indicate that that term as used in that act, was not deemed sufficiently broad to include land with which the government had parted with title, even though it be held in trust for the Indian, and, *a fortiori* must the term "Indian country," have been used in a sense excluding entirely lands that the government had patented to white citizens without any restriction whatsoever. Therefore, it seems to me that by the very terms of the act under which the respondent was charged, even if the same could be held constitutional, that the lands included within the Village of Culdesac, the title to which had passed from the United States without restriction, are excluded from the term "Indian Country", as contained in said act.

There can be no doubt that the effect of the act of January 30th, 1897, 28 Stat. L. 506, is to amend the laws existing at the time of the agreement of May 1, 1893, with the Nez Perces, in relation to the prohibition of the introduction of intoxicating liquors into the Indian country, by providing a definition of the term Indian country, which by specifically including any Indian allotment while the title to the same shall be held in trust by the government, thereby excluded the idea that the term "Indian Country" includes lands of which the title had passed by government patent to citizens of the state without restriction. This act is of general ap-

plication, and the Nez Perce Indian reservation is in no manner excepted from its provisions. It cannot be successfully maintained that congress, by the act of ratifying the agreement with the Nez Perces, could place any restrictions upon future legislation, amending or even abrogating the existing law in reference to the prohibition of the introduction of liquor.

The plenary power of Congress over tribal relations and lands cannot be limited by provisions of treaty so as to preclude future enactments, giving effect to the government policy in relation thereto.

Lone Wolf v. Hitchcock, 187 U. S. 553.

A brief consideration of the principles upon which this Court decided, in the matter of Heff, that the act of 1897, 29 Stat. L. 506, was invalid, is as far as it attempted to regulate the sale of liquor to an Indian who had become a citizen, I think will lead to the conclusion that it is equally invalid in as far as it is attempted to apply it to prohibit the introduction of liquor for the purpose of commerce with citizens at any place where the government has parted with its title to the citizens of the state without any restriction.

This Court, in a line of decisions reaching from a period of nearly a century, has based the power of the Federal government to legislate in reference to the sale of liquor to Indians solely upon the provision of section 8, article 1, of the Constitution, granting to Congress power "to regulate commerce with foreign nations, and among the several states, and with Indian tribes."

For the purpose of giving effect to this provision of the Constitution, Indian tribes were considered as standing in a similar position to foreign nations, and members of Indian tribes were treated in analogy to citizens of a foreign country.

As long as the tribal relations were maintained, this Court has repeatedly held that Congress, under this provision of the Constitution, had power not only to prohibit the sale of liquor within the Indian country, but to members of the tribes outside of the Indian country, and in United States v. Forty

three Gallons Whisky, 93 U. S., 198, held that congress had power to exclude spiritous liquors not only from Indian countries, but from that which has ceased to be so by reason of its cession to the United States, but being within territory in proximity to that where the Indian lived. This case is cited by the Honorable Solicitor General in his brief accompanying his petition for certiorari, and is relied upon as sustaining his position that the United States has jurisdiction in the case at bar. It will be noted, however, that that the authority of Congress in that case is predicated entirely upon the clause in the constitution relating to the regulating of commerce with Indian *tribes*. The Court in that case, referring to United States vs. Holliday, 3 Wall, 409, which is followed, says:

> But this Court held that the power to regulate commerce *with Indian tribes* was in its nature general and not confined to any locality, that its existence carried with it the right to exercise it *whenever there was a subject to act upon*, although within the limits of the state, and that it extended to the regulation of commerce with the individual members of such *tribes*. * * * * *

The Court then proceeds to apply these principles to the case under consideration, as follows:

> As long as the Indian remains a *distinct people with the existing tribal organizations*, recognized by the Political Department of the Government, Congress has power to say with whom and on what terms they shall deal, and what articles shall be contraband.

The Court in this case also cited Worcester v. Georgia, 6 Pet. 515, and commenting upon that case says:

> Chief Justice Marshall, in this case with force of reasoning and extent of learning rarely equalled, stated and explained the condition of the Indians in their relation to the United States and to the states within whose boundaries they lived, and this exposition was *based on the power to make treaties and regulate commerce*

> *with the Indian tribes*, * * * * * and Congress has now the exclusive and unfettered power to regulate commerce with the *Indian tribes*, a power as broad as to regulate commerce with foreign nations.

In a decision sustaining the constitutionality of the act of 1862 amending the act of June 30th, 1834, 4 Stat. U. S. 732, prohibiting the sale of spiritous liquors to an Indian under the charge of an Indian agent, this Court said:

> The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any *Indian tribe* or any person who is *a member of such tribe* is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on. It is not, however, intended by these remarks to imply that this clause of the Constitution authorizes Congress to regulate any other commerce, originated and ended within the limits of a single state, than commerce with the *Indian tribes*.
>
> United States v. Holliday, 3 Wall. 407-420.

The only essential point decided in Bates v. Clarke, 95 U. S. 204, also cited by the Solicitor General, is that all the country described by the act of 1834 as Indian country, remains Indian country so long as the Indians retain their title and right to the soil, and ceases to be Indian country whenever they lose their title, in absence of any different provision by treaty or by act of Congress. And in this case the Court holds that the territory upon which the liquor was seized had ceased to be Indian country as soon as the Indians parted with title, without any further act of Congress.

And in this case the Courtt distinguished its decision in United States v. Forty-three Gallons Whisky, supra, as follows:

> While the Court holds that by a certain clause in the treaty by which the *locus in quo* was ceded by the In-

> dians, it remains Indian Country until they remove from it. The whole opinion goes upon the hypothesis that when the Indian title is extinguished, it ceases to be Indian Country, unless some such reservation takes it out of the rule.

It will be noted that the treaty with the Red Lake and Pembina band of Chippewa Indians, ceding to the United States a portion of their land was concluded on October 2, 1863, and it was under this treaty and under the condition then existing, and under the policy then pursued by the United States in the government of Indians, that the decision in United States v. Forty-three Gallons Whisky, supra, was based.

The distinction between that case and the case at bar is apparent and well defined. There was nothing in that treaty looking to the dissolution of the tribal relation of the Indians, the tribes remaining intact, and at that time the policy of the Government was to deal with the Indians by treaties, and as a people distinct from the citizenry of the nation.

By the act of March 3, 1871, 16 Stat. L. 556, it is provided:

> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty.

Referring to the act of Congress above quoted, this Court has said:

> After an experience of one hundred years of treaty-making system of government, Congress has determined upon a new departure—to govern them by acts of Congress.
>
> United States v. Kagama, 118, U. S. 375.

And in the matter of Heff, 198 U. S., page 498-499, says:

> From that time on, the Indian tribes and individual members thereof, had been subject to direct legislation of Congress, which for some time thereafter continued the policy of locating the tribes of separate reservations, and perpetuating the communal of tribal life. * * * * Of lete years, a new policy has found expression in the legislation of Congress, a policy which looks to the breaking up of tribal relations, the establishing of separate Indians in individual homes, free from national guardianship, and charged with all the rights and obligations of citizens of the United States."

It is under these later conditions, and the present policy of the government, and of Congress, that we must view the statute under which the respondent was convicted—interpret and construe it in reference to the agreement of May 1, 1893, with the Nez Perces; test its constitutionality, and weigh the power of Congress to reserve partial sovereignty within the former Nez Perce reservation.

The very effect and purpose of the agreement of May 1, 1893, with the Nez Perces was to break up the tribal relations; to dissolve the tribal entity; to do away with the last remnant of inter-tribal customs, government, and police control; to remove the very machinery of government supervision and control, and renounce the guardianship of the goernment over the persons of the Indians; to renounce as well anything like a general guardianship over even the property of the Indian—the Indian being left free to hold property and contract for himself in reference thereto, save a restriction upon the alienation of land patented to him by the government.

In fact, the Government of the United States, by the very act of ratifying the said agreement with the Nez Perces, not only renounced its guardianship of the person and general property of every Indian of the former Nez Perce tribe, but practically destroyed the very machinery by which the Indians could govern themselves.

Unless the sixteen hundred Indians immediately become full citizens of the state of Idaho, and, in fact, subject to all its laws, both civil and criminal, upon the acceptance of land in severalty, as provided by the act of February 8, 1887, then they are without government or means of government; their political and civil status an anomaly suspended in the air between the sovereignty of the state and the sovereignty of the nation.

The Honorable Solicitor General, as we understand his argument, contends that there can be such a thing as qualified citizenship—that is, that it was competent for Congress to confer upon the Indians such citizenship as would entitle them to all the rights of citizens of the state where they were located, and at the same time, deny to the state the right to subject them to the same complete and exclusive police control that it may its other citizens.

> Equality of rights and of responsibilities is an incident of citizenship, and those Indians who have become citizens may be likened to the negroes in this country since their enfranchisement by the fifteenth amendment to the constitution, of whom the supreme court, in an opinion written by Mr. Justice Bradley, has said: "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws, and when his rights as a citizen or a man are to be protected in the ordinary modes by which other men's rights are protected." Civil Rights Cases, 109 U. S. 25.
>
> In Celestine, 114 Fed. 551-553.

We are entitled to presume that the political department of the government, before alloting the land in severalty to the Nez Perces, and thereby conferring upon them the rights and corresponding responsibilities of citizenship, had

determined that the members of that tribe were sufficiently advanced in civilization to be safely intrusted with the immediate duties and grave responsibilities concomitant with such a status.

In fact, the Nez Perces are perhaps among the most enlightened and intelligent of the Indian tribes.

Even if the reverse were true, Congress was without power under the constitution to renounce the government duty of police control of these people, to break up their tribal relations, and distribute them among the white citizens of Idaho, clothed with all the rights of ordinary citizens and freed from the restriction of government control, and, at the same time, to deny to the state the same full control it has over its other citizens.

The Supreme Court of Kansas, in a recent case, cited with approval by this Court, in re Heff, supra, says:

> Congress, by authorizing the leasing and the sale of lands by the allottees with the approval of the secretary of the interior, encouraged the whites to go among the Indians and upon their lands, not with the view of benefitting the white man, but with the view of giving to the Indians better environments and developing their lands. We are not to presume that Congress would encourage the white man to go with his family among and upon the lands of the Indian for the benefit of the Indian, and not protect him, his family, and his property against the depredations and lawlessness of the Indian, unrestrained other than by the laws of the tribe to which he belongs. * * * * * * It is not to be presumed that the rights of citizenship would be conferred upon the allottee for his benefit, and he be for a period of twenty-five years exempted from the operation of the laws of the state of which he became a citizen, and, aside from those crimes specifically mentioned in the act of March 3, 1885, be restrained only by a code of laws based upon the primitive ideas and

standards of a tribal council. An Indian upon whom has been conferred citizenship and who enjoys the protection of the laws of the state, should be punished for a transgression of them. This we are to presume Congress contemplated.

In re Now-goe-Zhuck, 76 Pacific, 877-880.

This reasoning of the Supreme Court of Kansas is peculiarly applicable to the condition of the Nez Perces existing at the time of the allotment, and since developed upon their former reservation.

The Nez Perce reservation consisted of over thirty townships, or something like 700,000 acres of land.

The reservation was at this time, and for many years prior thereto has been, surrounded by settled communities. The Indians for years had mingled freely with the white settlers. Practically all the younger Indians were versed in the English language. Probably a majority of the Indians had adopted the Christian religion, and, as a whole, the tribe was far advanced in civilization.

The topography of the reservation is peculiar. The Clearwater river traverses the reservation in a northeasterly direction for nearly seventy miles. The general elevation above sea level of the valley of the Clearwater is from six to seven hundred feet. Lying west of the Clearwater valley, at an altitude of nearly 3,000 feet above sea level, is a level plateau of prairie lands, having an area of several hundred thousand acres.

The Indians were in actual occupancy only of the river valley. Practically none of the Indians ever lived upon or occupied the high lands.

Upon the taking of allotments in severalty, the Indians selected for their homes the low lands in the valley of the Clearwater and its tributaries. It is true several hundred allotments were taken upon the high prairie lands, but with perhaps less than a score of exceptions, these lands have never

been occupied by Indians as homes, but have been leased to the whites. The Indian owners continued to live in the settlements along the river.

Since opening the ceded lands for settlement in November, 1895, practically all of the ceded lands have been located under the homestead and townsite laws, and a large portion thereof has since been conveyed by patent to the settlers without any restriction whatever in the patent against the use and occupation of the land for any purpose.

The white population upon the ceded lands within the former reservation today numbers little less than 10,000 people. There are several towns thereon incorporated under the laws of Idaho, among which are Nezperce, with a population of one thousand, Culdesac, Stites, Kooskia, Peck, Ilo, Mohler, Orofino, Kamiah, Gifford and a number of other towns and villages each having a population of several hundred people.

The upland plateau I have mentioned is now practically a vast grain field of several hundred thousand acres producing annually six or seven million bushels of grain.

Congress must have anticipated such results from the opening of this vast territory to settlement. It is but the repetition of many a like chapter inthe history of the settlement of the fertile prairie lands of the west.

It is no longer a question of the government protecting the Indians and feeble frontier settlements of whites from the demoralization and danger of the intoxication of savages.

The Nez Perce Indians of today as a whole, are not so much worse than their white brothers in their tendency to use intoxicating liquors to excess. I believe I am entirely conservative in saying that there are not exceeding one hundred Indians among the entire band of Nez Perces who drink liquor to an extent to cause any serious injury to themselves, or any annoyance to the white settlers.

The motive for establishing saloons upon the reservation is not at all for the purpose of engaging in traffic with the

Indians, but for the purpose of furnishing liquors desired by the white settlers for mechanical and medicinal purposes, and as a beverage. It is safe to say that not 3 per cent of the liquors introduced upon the former Nez Perce reservation are consumed by Indians.

It is not a question of regulating commerce among the Indian tribes, for there are no Indians here living in tribal relations, nor even is it to any controlling degree a question of commerce with individual Indian citizens, but it is essentially and pre-eminently a question of regulation of the liquor traffic among the white citizens of the state.

The danger of any encroachment upon the system of independent local self-government contemplated by our constitution is well illustrated by the conditions prevailing in the former Nez Perce reservation prior to the decision of the Circuit Court of Appeals in this case, holding that the state had jurisdiction in the premises.

In every town and even in every little hamlet and crossroad throughout the reservation were men engaged in the illicit sale of intoxicating liquors. The government, from the fact that it has no organized system of local police or constabulary, has been powerless to suppress or even regulate this traffic. In many instances, the men engaged in this traffic were criminals of the worst type, and their places of business, commonly called "boot-legging joints" were the headquarters of gamblers and criminals, and breeding places of vice.

Since the decision of the Circuit Court of Appeals, the state has assumed jurisdiction over this territory and brought the same within its system of high license control. The boot-legging joint has entirely disappeared, and in its place is the licensed saloon, subject to constant inspection and control by the local police officers of the state, and of the municipality wherein such saloon is located.

Thus, the Indian shares with the white citizen a better and healthier condition of civic life under state control.

I have referred to the history and conditions of the Nez Perces perhaps to an extent that might seem to go beyond the matters shown by the record herein. I am induced to do so partly from the fact that the Honorable Solicitor General, in the brief accompanying his petition for certorari, page 27, quotes freely from the report of the Commissioner of Indian Affairs, in reference to some of these matters, and principally because I deem all the matters of fact that I have stated to be matters of history, and general public knowledge within the districts of Idaho, of which the United States courts may take judicial knowledge, and because the considerations I have suggested in connection with the agreement with the Nez Perces, and the various acts of Congress in the premises, show conclusively that it must have been the intention of Congress to terminate the tribal relations with the Nez Perces, and that the effect of all this legislation has been to bring about a state of affairs entirely inconsistent with the idea that the political department of this government still retains any such general control over the persons of the Indians as is inconsistent with the intention of Congress to renounce entirely its guardianship over the persons of the Indians.

I could not better illustrate the reverse conditions upon which the earlier decisions are based sustaining the jurisdiction of the United States over Indians, than by quoting the views of this court expressed in an opinion by Mr. Justice Miller, in a decision sustaining a conviction in the United States Court of an Indian of the crime of murder, wherein the tribal status of the Indian and consequent non-allegiance to the state are clearly made the controlling consideration.

> Its effect (the statute under consideration) is confined to the *acts of an Indian of some tribe*, or a criminal character, committed within the limits of the reservation. It seems to us that this is within the competency of Congress.
>
> These *Indian Tribes* are the wards of the Nation. They are communities dependent on the United States;

dependent largely for their daily food; dependent for their political rights. *They owe no allegiance to the States and receive from them no protection.* Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by Congress, and by this court whenever the question has arisen."

United States v. Kagama, 118 U. S. 375-385.

In the brief file in No. 557, in oposition to the application for the writ of certiorari herein, at pages 12-13, I suggested that the provisions of Section 19, Article 21 of the Constitution of the State of Idaho, providing, in effect, that the jurisdiction of the United States over the lands owned by Indians and Indian tribes should continue only until the Indian title thereto should be extinguished, as expressly ratified by act of Congress of June 3, 1890, admitting Idaho as a state, amounted to a compact between the United States and the State of Idaho granting the state exclusive jurisdiction over such Indian reservations for all purposes of police control, *as soon as the title should be extinguished*; and that, inasmuch as by the subsequent agreement of May 1, 1893, with the Nez Perces, as ratified by act of Congress, August 15, 1904, 28 Stats. 332, the Indian title was extinguished, Congress was without authority to reserve jurisdiction over the land ceded after the *Indian title had been extinguished*, especially after the title thereto had, as in the case at bar, passed from the United States to citizens of Idaho under the townsite laws, without any restrictions in the government patent.

Upon this point, this court, in a case involving the construction of similar provisions in the Constitution of the

State of Montana, and in the act of Congress admitting that state to the Union, has said:

> In February, 1887, by a general law, congress provided for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the territories over the Indians, and for other purposes. 24 Stat. 388. The act in question contemplated the gradual extinction of Indian reservations and Indian titles by the allotment of such lands to the Indians in severalty. It provided in Sections 6 'that upon the completion of said allotments and the patenting of said lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the state or territory in which they may reside.' But the act at the same time put limitations and restrictions upon the power of the Indians to sell, incumber, or deal with the lands thus to be alloted. * * From these enactments it clearly follows that at the time of the admission of Montana into the Union, and the use in the enabling act of the restrictive words here relied upon, there was a condition of things provided for by the statute law of the United States, and contemplated to arise, where the reservation of jurisdiction and control over the Indian lands would become essential to prevent any implication of the *power of the state to frustate the limitations imposed by the laws of the United States upon the title of lands* once in an Indian reservation, but which *had become extinct by allotment in severalty*, and in which contingency the *Indians themselves would have passed under the authority and control of the state.*

Draper v. United States, 164, U. S. 240.

And in discussing the act of Congress admitting Colorado into the Union as a state, this court has said:

> The act of March 3, 1905, necessarily repeals the provisions of any prior statute or of any existing treaty which are clearly inconsistent therewith. Case of the Cherokee Tobacco, 11, Wall. 616. Whenever, upon the admission of a state into the Union, Congress has intended to except out of it an Indian reservation, or the sole and exclusive jurisdiction over that reservation, it has done so by express words. * * * * * * * The record before us presents no question under the provisions of the treaty as to the punishment of crimes committed by or against Indians, the protection of the Indian in their improvements, or the regulation by Congress of the alienation and descent of property and the government and internal police of the Indians.
>
> United States v. McBratney, 104, U. S. 621-624.

Applying the principles declared by this court in Draper vs. United States, and in United States vs. McBratney, supra, to the question of jurisdiction of the United States over lands ceded by the Nez Perces, the jurisdiction of the United States would be limited to the protection of the lands allotted from alienation or encumbrance, and incidentally, perhaps, the protection of the improvements upon said lands, for, as suggested in Draper v. United States, the Indians themselves, by act of taking allotments in severalty under the provisions of the law of 1887, have passed under the authority and control of the state, and are subject to its laws, both civil and criminal, and therefore, crimes committed by or against Indians are to be punished the same as crimes committed by or against the white citizens, and all questions of the government and internal police of the Indians become inapplicable, as such functions cannot properly be exercised by the United States over citizens of the state in their intercourse and commerce with each other within the state.

The United States v. Rickert, 188, U. S. 432, cited by th Honorable Solicitor General, is clearly distinguished by this court in re Heff, in as far as it was relation to the

issues in the case at bar. What is said therein in reference to the Indians being wards of the government, when read in light of the entire decision, only goes to the extent of a special guardianship for the purpose of protecting the lands alloted and the personal property given the Indians by the government to aid them in adopting the ways of civilization. There is nothing in that decision that suggests that the government retains any control over the person of the Indians after they become citizens. It is with this latter question, and not with the property rights of Indians, that the case at bar has to do. In this case the introduction of the liquor was not upon an Indian allottment, but upon lands admitted to be owned in fee by white citizens of Idaho

SUMMARY OF MATTERS SHOWN BY TRANSCRIPT OF RECORD.

The petition for Writ of Habeas Corpus and Certiorari sets up all of the proceedings in the District Court upon which the imprisonment of the pettitioner is based. (Transcript, pages 1-12.)

The ground for relief is stated generally as follows: (Transcript, Folio 2, page 2.

That the indictment did not charge a public offense, or establish a violation of 29 Stat. L. 506, "and that the said statute in as far as it assumes to punish as an offense against the laws of the United States, the bringing of liquor within the limits of this state, and not reserved by the government for the exclusive use of Indians, is unconstitutional and void; and for the further reason that the court has no jurisdiction of the subject matter of the offense charged, or attempted to be alleged in the indictment, or over the person of the defendant for the reasons above stated."

The petition, (Transcript, folio 5-10, pages 2-5) in detail, be reference to the pleadings, evidence and instructions of the court, shows: that it is a conceded and uncontro-

verted fact that the only act done by the petitioner upon which the conviction and imprisonment of the defendant was based, was to buy a bottle of whiskey in the Village of Culdesac, and deliver it at the door of the building of a Nez Perce Indian, who had theretofore taken his land in severalty, and to whom a trust patent had issued; and that in no wise in any of the proceedings in the District Court was the claim made that the indictment was founded upon any other transaction, than as before stated, nor that any other state of fact was proven, nor any other issues submitted to the jury, nor that there was any claim, or pretense even, that Culdesac is upon lands reserved for any Indian or government purpose, or that said village is even upon an Indian allotment.

The petition further shows that the petitioner in the District Court protested against these proceedings, and challenged the jurisdiction of the court at every step upon the identical grounds urged in his petition for habeas corpus and certiorari:—by demurrer to jurisdiction, exhibit "B", Folio 15, page 7; by obection to the introduction of evidence, folio 4; (see also folio 50, page 24) by rejquests for instructions and exceptions to the charge of the court, folio 6; (see also folio 56, pages 27-28) and by motion in arrest of judgment, exhibit "D," folio 19, page 9.

The petition further says (Folio 11, page 5:

> For the foregoing reasons and for the further reason that the Hon. James H. Beatty, judge of the United States District Court for the district of Idaho, under whose jurisdiction your petitioner is now confined and restrained of his liberty, has passed upon all the questions presented and raised by this application, holding against the contention of your petitioner, making such application to the distret judge a useless procedure and on account of the delays incident to appeal therefrom, your petitioner has no plain, speedy, or any adequate remedy at law, therefore this application is presented direct to the Hon. United States Circuit Court of Appeals."

Petitioner prays (folio 11, page 5) for writ of habeas corpus, and for writ of certiorari.

The theory upon which the petitioner was tried and convicted is clearly shown by the opinion of the Honorable District Judge overruling the demurrer to the jurisdiction of the court, and in the instructions to the jury.

The opinion in no wise suggests that a clear issue of law is not presented challenging the jurisdiction of the Court, and upholds the indictment and retains jurisdiction solely upon the grounds that the *entire* former Nez Perce reservation is still Indian country, and that *all* the Nez Perce Indians are still wards of the government and not citizens, notwithstanding, it is conceded that they have received allotments in severalty. The court says (Transcript, folio 71, page 35):

> "It leaves *the entire reservation* and *all the Indian allottes* thereof for 25 years from May 1, 1893, subject to all the United States laws prohibiting the introduction of intoxicants into the reservation or the disposition thereof to the Indians. If, now, this is inconsistent with those provisions of the former act under which the Supreme Court has held that Indian allottees are entitled to citizenship, and are not subject to the laws concerning intoxicants, it must follow that these *provisions of the act of* 1887 *are not applicable to the Nez Perce to the laws of the state, but are* still the wards of the nation at least so far as concerns the laws regulating the sale of intoxicants."

The entire instruction given to the jury was as follows, (Transcript, folio 55, page 27):

> Gentlemen: The only instruction I need to give you is this: If you find that the defendant had this bottle of whiskey upon him *within the limits of what is known as Nez Perce Indian Reservation*, then you are to find him guilty of this charge. The charge, of course, is for *introducing liquor into the reservation*, but I instruct

you that having it in his possession upon the reservation *is conclusive.* When and where he bought it is immaterial; that it was in his possession within the limits of the Indian reservation is sufficient. *I instruct you as a matter of fact, that Culdesac is within the limits of the reservation.*"

The opinion of the learned District Judge, as well as the instructions to the jury, not only settles the question that the *locus in quo* of the alleged offense charged in the indictment, as well as the facts of the transactions relied upon to support the jurisdiction of the court are, and were conceded by the government at every step of the proceeding to be, as we have herein contended; but it does more, we are brought face to face with the startling proposition that the *act of 1887 is not applicable to the Nez Perce Indians,* and that they are *neither citizens nor subject to the laws of the state.*

Not subject to the laws of the state! Then to what laws are they subject? The tribal community has been disolved, the government no longer maintains any machinery to police the reservation; the Indians are left free to roam at will; ten thousand white settlers, at the invitation of the government, have settled upon the former reservation. Where, if not in the state, is vested the jurisdiction and the power to protect the family and property of these citizens of Idaho?

But to analyze the charge of the Court. The jury is told that "the charge—of course, is for *introducing liquor* upon the reservation, but I instruct you that having it in his *possession* upon the reservation is *conclusive.*"

It would seem to me that this not only denies to the defendant the presumption of innocence, but denies him even the right to prove his innocence.

In fact, the evidence offered by the government shows affirmatively that the defendant did not introduce the liquor, and that the only dominion or control that he exercised over the whiskey either directly or indirectly, was to purchase the same at a certain place within the town of Culdesac, and

immediately dispose of the same there. (Transcript, folio 51, page 25; folio 53-54, page 26.)

It will be noted that the defendant was not charged with *selling* or *giving* the liquor to Indians, but of *introducing* liquor into the Indian country.

The petitioner himself is a Umatilla Indian, and the Indians with whom he divided the liquor were Nez Perces who had taken allotments in severalty.

For the offense of being sociable with his Indian fellow citizens, the Umatilla Indian, Dick, the petitioner herein, is now serving a term in the Idaho Penitentiary.

Thus, if the governments's position as to the status of Indian allottees be true, does the benificent guardian and instructor tenderly wrap the the mantle of protection around the Indian ward and pupil.

Again, to apply the doctrine of the learned District Judge to the ten thousand white settlers within the former reservation, each and every one of them who may have a half pint of wine or brandy in their possession, whether it is for medicinal or household use, or for however needful, innocent, or lawful purpose, is *conclusively presumed* to be *guilty*, and may be sent to the penitentiary.

The conclusion to which this contention leads is an efficient demonstration of the fallacy of the government's provision that congress intended the act of 1897, 29 Stat. L. 506, under which petitioner is imprisoned, to apply to the lands patented to white settlers. It certainly is a striking illustration of the confusion and anomoly to which a divided sovereignty in matters of police control may lead.

Yet, the petitioner by the application of such doctrine,—charged under such unconstitutional statute was committed to prison, though protesting against such invasion of his constitutional rights in every lawful way in the District Court; and when he applied for relief in the Circuit Court of Appeals by Writ of Habeas Corpus and Certiorari, the govern-

ment submits without protest to the jurisdiction of that court to so review the decision of the District Court; and it is here for the first time that petitioner is met by the contention that he had a plain and speedy remedy by appeal or writ of error, and further, that the Circuit Court of Appeals is without jurisdiction to issue writs of habeas corpus.

As to the first contention, I submit that any citizen is entitled to the writ of habeas corpus as a matter of right, whenever imprisoned without authority of law under an unconstitutional statute, especially when the highest court of the land has theretofore clearly declared such statute to be unconstitutional, and where the inferior court declines to follow such decision.

In respondent's brief filed in opposition to the application for writ of certiorari (pages 4-9), I have discussed the question of the jurisdiction of the Circuit Court of Appeals to issue write of habeas corpus, and now submit that question without further argument, believing that a reasonable construction of the Circuit Court of Appeal's act with a view of giving full effect to the general purpose to be accomplished by the creation of said court, will lead to the conclusion that it was intended to confer this power upon said court by the provisions of Section 12 of said act, wherein the Circuit Court of Appeals is granted all the powers specified in Section 716 Revised Statutes.

I would further direct the attention of the court to the fact that in the case at bar the Circuit Court of Appeals issued a *writ of certiorari* to the District Court (Transcript, folio 80, page 38), and that such writ was returned, and all the proceedings were thus brought before the Circuit Court of Appeals, and it was upon such return, that the Circuit Court of Appeals made this order discharging the prisoner (Transcript, folio 89, pages 40-43).

I think the Circuit Court of Appeals clearly had jurisdiction to issue such writ of certiorari under the provisions of section 716 of the Revised Statutes, which is expressly made applicable to the Circuit Court of Appeals by Section

12 of the act creating that Court, and which section empowers such court to issue such writs as *"may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law,"* and that such proceedings were clearly within the jurisdiction of the Circuit Court of Appeals. At most, it could only be urged that there was an irregularity of practice. This, we by no means concede, but in any event objection should have been made to such alleged irregularities in the Circuit Court of Appeals, and it cannot be raised here for the first time.

We submit further, that in no event under a record showing conclusively that the petitioner in a habeas corpus proceeding is unlawfully imprisoned, should this court exercise its discretionary power of review, over the Circuit Court of Appeals for the purpose *of re-instating a a void judgment or remanding the respondent to an unlawful imprisonment.*

In addition to the authorities herein cited, we would particularly direct the attention of the court to that portion of respondent's brief in opposition to the writ of certiorari (pages 10-16), wherein I discussed in detail some of the matters bearing upon the question of the jurisdiction of the United States for the purpose of police control over the territory embraced within the Village of Culdesac.

In the last analysis the one vital question at issue in the case at bar is: "Can a divided sovereignty for the purpose of police control exist under our system of government. We understood this question to have been absolutely settled by this Court in the matter of Heff, and as suggested before an examination of the brief of the Honorable Solicitor General in the matter of Heff, as well as the decision of the Court therein, shows that all the considerations now urged by the government in favor of qualified citizenship or a divided sovereignty, were substantially urged in the former case, and explicity passed upon adversely to the government's position. I do not understand that any new doctrine was enunciated by this court in the Heff case, but if there are any decisions of this court holding contrary thereto, certainly

these decisions must be considered as overruled or distinguished in as far as they may be urged as precedents for upholding the constitutionality of any law attempting to provide for a qualified citizenship or a divided sovereignty.

Respectfully submitted,

FRANK E. FOGG,

Attorney for Respondent.

Supreme Court of the United States.

Nos. 494 and 557.—October Term, 1905.

E. L. Whitney, Warden of the Idaho State Penitentiary, Appellant, vs. George Dick, Respondent.	Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.
494	
E. L. Whitney, Warden of the Idaho State Penitentiary, Petitioner, vs. George Dick, Respondent.	On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
557	

[April 30, 1906.]

On May 16, 1905, the respondent in these two cases was convicted in the District Court of the United States for the District of Idaho, Northern Division, on the charge of unlawfully and feloniously introducing intoxicating liquors into the Nez Perce Indian Reservation, and sentenced to pay a fine of $100 and be confined in the penitentiary for the term of one year and ten days. On July 21, 1905, a bill of exceptions was duly prepared and signed. Thereafter, without suing out a writ of error, respondent applied to the Circuit Court of Appeals of the Ninth Circuit for writs of habeas corpus and of certiorari. It does not affirmatively appear that any writ of habeas corpus was issued, the record in the Court of Appeals reciting:

"The petition in the above-entitled matter for a writ of habeas corpus and a writ of certiorari having been duly submitted to the court, and the petition for a writ of certiorari therein having been granted and a writ of certiorari having been issued, directed to the honorable the United States District Court for the District of Idaho, and requiring the said District Court to certify to this court a transcript of the record and proceedings in the suit therein of the *United States* v. *George Dick*, and the return to the said writ of certiorari having been filed, the matter was duly argued and submitted to the court for consideration and decision upon the said return and upon the briefs of counsel for the respective parties.

"On consideration whereof, and the court being of the opinion that the United States District Court for the District of Idaho did not have jurisdiction of the offense charged in the indictment found against the petitioner in the suit of the *United States* v. *George Dick*, it is ordered and adjudged that the petitioner, George Dick, be discharged from imprisonment."

From this order of discharge, Whitney, as Warden of the Idaho State penitentiary, (the respondent named in the petition for a habeas corpus,) perfected an appeal to this court, and that appeal is case No. 494.

Subsequently he applied for a writ of certiorari, to review the decision of the Court of Appeals, which was allowed, and that is case No. 537. The record in case No. 494 was directed to stand as the return to the writ of certiorari. Both the appeal and the certiorari were taken by the Warden, appearing by the United States Attorney for the District of Idaho, under the direction of the Attorney General of the United States.

Mr. Justice BREWER delivered the opinion of the Court.

The first question is, of course, one of jurisdiction. Final orders of the Circuit Court of Appeals may of right be brought to this court only where the matter in dispute exceeds in value one thousand dollars. As there is no amount in controversy, the appeal was unauthorized and must be dismissed. *Lau Ow Bew* v. *United States*, 144 U. S. 47, 58. But by certiorari the judgment of the Court of Appeals is properly before us. *In re Chetwood, Petitioner*, 165 U. S. 443, 462.

Had the Court of Appeals jurisdiction to issue separately either a writ of certiorari or one of habeas corpus, or the two jointly? And first, as to the writ of habeas corpus. Undoubtedly that writ is one of high privilege. We are not confronted with the case of a failure by Congress to make any provision for it. Under section 751, Rev. Stat. the Supreme, Circuit and District Courts may issue writs of habeas corpus, and by section 752 like power is given to the several justices and judges of said courts for the purpose of inquiry into the cause of restraint of liberty. Thus adequate provision has been made for securing to every one entitled thereto the writ of habeas corpus. So when Congress passes an act establishing a new court there is no constraining presumption that it must intend to give to that court jurisdiction in habeas corpus. The Court of Appeals act (26 Stat. 826) does not in terms grant authority to issue the writ. It is silent on the subject, and in order to sustain its jurisdiction we must write something into the statute which Congress itself did not put there. In this we are speaking of the writ of habeas corpus as an original and independent proceeding, for by section 12 of the act "the Circuit Court of Appeals shall have the powers specified in section 716 of the Revised Statutes of the United States." Section 716 provides that "the Supreme Court and the Circuit and District Courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." Cases may arise in which the writ of habeas corpus is necessary to the complete exercise of the appellate jurisdiction vested in the Circuit Court of Appeals. But it is unnecessary to speculate under what circumstances such an exigency may exist, for the writ asked for here was an independent and original proceeding

challenging *in toto* the validity of a judgment rendered in another court There was no proceeding of an appellate character pending in the Court of Appeals for the complete exercise of jurisdiction in which any auxiliary writ of habeas corpus was requisite. Appellate proceedings are, generally speaking, initiated by appeals and writs of error, and for these the Court of Appeals act specifically provides. The writ of habeas corpus is not the equivalent of an appeal or writ of error. It is not a proceeding to correct errors which may have occurred in the trial of the case below. It is an attack directly upon the validity of the judgment, and, as has been frequently said, it cannot be transformed into a writ of error. It is doubtless true that if the language of the Court of Appeals act was fairly susceptible of two constructions, one granting and the other omitting to grant power to issue a writ of habeas corpus, the great importance of the writ might justify a construction upholding the grant. This is indicated by the ruling in *Ex parte Bollman*, (4 Cranch, 75.) The fourteenth section of the original judiciary act contained this language: "That all the before-mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." And the question presented was whether the grant of power to issue a writ of habeas corpus was an absolute and independent grant or one simply authorizing the issue of the writ when necessary for and in aid of the exercise of a jurisdiction already otherwise obtained, and it was held to be an absolute and independent grant, the conclusion being placed by Chief Justice Marshall, delivering the opinion of the Court, partly on the grammatical construction of the section and partly on the significance and importance of the writ itself. But in the Court of Appeals act there is no mention of habeas corpus, no language which can be tortured into a grant of power to issue the writ, except in cases where it may be necessary for the exercise of a jurisdiction already existing.

It will be borne in mind that the Circuit Court of Appeals, which is a court created by statute, *Kentucky* v. *Powers*, 201 U. S. 1, 24, is not in terms endowed with any original jurisdiction. It is only a court of appeal. Section 2 of the act says that it "shall be a court of record with appellate jurisdiction, as is hereafter limited and established." Section 6 provides that it "shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases," etc. By section 10 "whenever on appeal or writ of error or otherwise a case coming from a Circuit Court of Appeals shall be reviewed and determined in the Supreme Court the cause shall be remanded by the Supreme Court to the proper District or Circuit Court for further proceedings in pursuance of such determination." Sections 4, 13 and 15 name the courts

whose judgments may be reviewed in the Courts of Appeal. Obviously the Courts of Appeal are simply given appellate jurisdiction over certain specified courts. It follows that they are not authorized to issue original and independent writs of habeas corpus.

Have they jurisdiction to issue writs of certiorari? As we have seen, the procedure prescribed by the statute for bringing to the Courts of Appeal those final decisions of courts which they are authorized to review is appeal or writ of error, and that in this country is the ordinary method by which review is obtained in an appellate court. Especially is this true of the Federal procedure, the only instance in which certiorari is named as the writ for the removal of cases from a lower to a higher court being in the authority given to this court to bring up cases from the Courts of Appeal by certiorari. Inasmuch as appeal and writ of error are specifically prescribed in the Court of Appeals act as the process to bring up final decisions to that court for review, the authority to issue a certiorari must be found in the grant of power "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." That certiorari may be used to bring up portions of a record not originally returned to a Court of Appeals is undoubted, for it may be necessary for the complete exercise of its appellate jurisdiction, but not otherwise, for every case of which that court may take jurisdiction can be carried up by appeal or writ of error. Of course, if in the case at bar the writ of habeas corpus was not or could not rightfully be issued, then certiorari cannot be sustained as auxiliary process, but must stand or fall as an independent proceeding.

It may be said that the power of this court to issue original and independent writs of certiorari has been upheld under the authority given by section 716. A reference to some of the decisions may be well. See generally *Ex parte Vallandigham*, 1 Wall. 243, and cases cited in the opinion; *Ewing* v. *City of St. Louis*, 5 Wall. 413; *Ex parte Lange*, 18 Wall. 163.

Fowler v. *Lindsey*, 3 Dall. 411, was the case of an application before judgment to remove certain actions from the Circuit Court to this court on the ground that a State was the real party in interest, and it was said by Mr. Justice Washington (p. 413):

"But as it is proposed to remove the suits under consideration from the Circuit Court into this court, by writs of certiorari, I ask whether it has ever happened, in the course of judicial proceedings, that a certiorari has issued from a superior to an inferior court, to remove a cause merely from a defect of jurisdiction? I do not know that such a case could ever occur."

In *American Construction Company* v. *Jacksonville Railway*, 148 U. S. 372, where an application was made for mandamus and certiorari, Mr. Justice Gray, speaking for the court, after quoting section 716, said (p. 380):

"Under this provision, the court might doubtless issue writs of certiorari, in proper cases. But the writ of certiorari has not been issued as freely by this court as by the Court of Queen's Bench in England. *Ex parte Vallandigham*, 1 Wall. 243, 249. It was never issued to bring up from an inferior court of the United States for trial a case within the exclusive jurisdiction of a higher court. *Fowler* v. *Lindsey*, 3 Dall. 411, 413; *Patterson* v. *United States*, 2 Wheat. 221, 225, 226; *Ex parte Hitz*, 111 U. S. 766. It was used by this court as an auxiliary process only, to supply imperfections in the record of a case already before it; and not, like a writ of error, to review the judgment of an inferior court. *Barton* v. *Petit*, 7 Cranch, 288; *Ex parte Gordon*, 1 Black, 503; *United States* v. *Adams*, 9 Wall. 661; *United States* v. *Young*, 94 U. S. 258; *Luxton* v. *North River Bridge*, 147 U. S. 337, 341."

In *In re Chetwood, Petitioner*, 165 U. S. 443, Mr. Chief Justice Fuller said (pp. 461–2):

"By section 14 of the Judiciary Act of September 24, 1789, (1 Stat. 81, c. 20,) carried forward as section 716 of the Revised Statutes, this court and the Circuit and District Courts of the United States were empowered by Congress 'to issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law;' and under this provision, we can undoubtedly issue writs of certiorari in all proper cases. *American Construction Company* v. *Jacksonville Railway*, 148 U. S. 372, 380. And although, as observed in that case, this writ has not been issued as freely by this court as by the Court of Queen's Bench in England, and, prior to the act of March 3, 1891, c. 517, 26 Stat. 826, had been ordinarily used as an auxiliary process merely, yet, whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice. Tidd's Prac. *398; Bac. Ab., Certiorari."

And in *In re Tampa Suburban Railroad Company*, 168 U. S. 583, it was held that "a writ of certiorari, such as is asked for in this case, will be refused when there is a plain and adequate remedy, by appeal or otherwise."

This court has never decided that certiorari was to be resorted to in place of a writ of error whenever it suited the convenience of parties. There must be "circumstances imperatively demanding" a departure from the ordinary remedy by writ of error or appeal. In the case at bar the indictment charges the introduction of liquor into the Indian country. It is not questioned that this is a criminal offense under the laws of the United States, but it is contended that the place of the alleged offense was not Indian country. The trial court ruled that it was. This ruling was excepted to, a bill of exceptions prepared and signed and the case put in proper condition for review in the Court of Appeals on writ of error. There was no necessity for a certiorari.

Apparently the thought of petitioner was to get rid of the case at once and entirely. It was not a new trial or any mere correction of errors, but a termination of the litigation which induced this proceeding rather than

a writ of error. It was a short way of disposing of the entire matter—the same reason that has so often prompted writs of habeas corpus. We have repeatedly held against such procedure. While undoubtedly the power exists, and it may sometimes be proper for a court to put an end to the litigation by some short summary process, yet as a rule the orderly way is to proceed by writ of error. The latest expression of the views of this court is to be found in *Riggins* v. *United States*, 199 U. S. 547. To that and the cases cited in the opinion we refer, saying that in the case at bar there is no special reason why the ordinary procedure should not obtain. It will be borne in mind that the act with which the respondent was charged was not done under or by virtue of the authority of the Constitution or laws of the United States, and therefore his prompt release is not necessary in order to uphold the national authority. It was not an act to be commended, and the only question is whether its punishment was within the jurisdiction of the Federal courts, and that question, under the circumstances, should have been settled in the ordinary way.

For these reasons the decision of the Court of Appeals is reversed, and the case is remanded with instructions to quash the writ of certiorari and dismiss the petition.

True copy.

Test:

Clerk Supreme Court, U. S.